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No. 80-11

In The

Supreme Court of the United States

October Term 1980

J. Gregory Merrion and Robert L. Bayless,
d/b/a Merrion and Bayless, Jerome T. McHugh,
Chase Oil Company, Dugan Production Corporation,
Consolidated Oil and Gas, Inc.,
Southland Royalty Company, Tesoro
Petroleum Corporation, Amerada Hess Corporation,
Supron Energy Corporation, Energy Reserves Group, Inc.,
J. M. Huber Corporation, Continental Oil Company,
(now Conoco Inc.),
Atlantic Richfield Company,
Phillips Petroleum Company,
Tenneco Oil Company, Getty Oil Company,
Gulf Oil Corporation, Mobil Oil Corporation
and Oxy Petroleum, Inc.,

Petitioners,

v.

Jicarilla Apache Tribe, Jicarilla Apache
Tribal Council, and Cecil Andrus,
Secretary of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For
The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution of the United States permits Indian tribes to exercise governmental powers of taxation of production of oil and gas by non-Indians without congressional approval.

2. Whether the Court of Appeals can impute attributes of inherent sovereignty to include tribal powers of taxation, without support in and contrary to the record below.

3. Whether such a tax can be justified where it is not imposed as a condition of entering onto Indian lands under leases entered into by the tribe and approved by the Secretary of the Interior.

4. If Indian tribes have the power to tax oil and gas produced under valid leases approved by the Secretary of the Interior, whether that power is pre-empted on Executive Order Indian reservations by 25 U.S.C. 398(c) and a total federal regulatory scheme.

5. If Indian tribes have governmental authority to impose taxes on non-Indians, whether constitutional provisions protect such non-Indians from abuses of tribal authority.

6. Whether taxation of production of oil and gas by both the State and Indian tribes unduly burden interstate commerce.

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No. .....

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
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PETITION FOR WRIT OF CERTIORARI

Petitioners, J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess Corporation, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company (now Conoco Inc.), Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum Inc., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 22, 1980, and amended on April 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals, reported at 617 F2d 537 (1980), appears in Appendix A hereto. The amendment to the opinion appears in Appendix B-2. No opinion was

rendered by the District Court for the District of New Mexico but that Court's Findings of Fact and Conclusions of Law appear in Appendix C, and its judgment in Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 22, 1980. That decision was modified and rehearing was denied by the Court of Appeals on April 25, 1980. (Appendix B-1). This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves the Constitution of the United States, particularly Article I, § 1, § 8, Clause 3, Article II, § 1, Article III, § 1, Article IV, §§ 1, 3, and 4, Article V, Article VI, Article VII, and the Fifth Amendment, Tenth Amendment and Fourteenth Amendment to the Constitution (Appendix E).

The case also involves the Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, *et seq.*, 25 U.S.C. §§ 461, *et seq.*, and Act of March 3, 1971, Chapter 120, § 1, 16 Stat. 566, 25 U.S.C., § 71 (Appendix F); the Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922 Appendix G); Executive Orders Relating to the Jicarilla Apache Reservation (Appendix H); and Act of March 3, 1927, Chapter 299, § 3, 44 Stat. 1347, 25 U.S.C. § 398c (quoted n. 11, p. 17, *infra.*

STATEMENT OF THE CASE

The Jicarilla Apache Tribe of Indians resides on a reservation created by Executive Order, which lies wholly

within the State of New Mexico (Appendix H). The State of New Mexico lies within an area ceded to the United States by the Treaty of Guadalupe Hidalgo which reserved no sovereign powers to any Indian tribe (Appendix G). The tribe is organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, *et seq.*, 25 U.S.C. § 461 *et seq.* (Appendix F).

Petitioners are engaged in the production of oil and gas from tribal lands under valid oil and gas leases issued with the approval of the Tribal Council and the Secretary of the Interior, and pay royalties to the Tribe. It is undisputed that many of these leases were issued prior to the Jicarillas' adoption of their revised constitution in 1968, the first to claim tribal power of taxation. Approximately 80% of the production is shipped interstate for sale outside the State of New Mexico (Appendix C, p. 71).

On July 9, 1976, the Jicarilla Apache Tribal Council adopted an ordinance entitled Oil and Gas Severance Tax (Appendix I). The Jicarilla Severance Tax was levied at the rate of $.05 per million BTU of gas. Oil and other liquid hydrocarbons "sold or transported off the reservation" are taxed at a rate of $.29 per barrel.

Petitioners filed a suit in the United States District Court for the District of New Mexico under 28 U.S.C. § 1331 alleging that the Jicarilla Apache Tribe lacked authority to tax non-Indians. Petitioners further alleged that if the Court should find the Tribe had any governmental authority to tax non-Indians then the Jicarilla Tax violated Article I, § 8, Clause 3 and the Fifth Amendment of the United States Constitution. Finally, Petitioners alleged that if the Tribe had the inherent sovereignty to levy a tax on non-Indians selling hydrocarbons produced on the Jicarilla Reservation then such tribal authority was preempted by 25 U.S.C.

§ 398c. A similar complaint was filed by Amoco Production Co., *et al.*, as Civil No. 77-343. The two cases were consolidated for trial and on appeal.

The District Court entered its Findings of Fact[1] and Conclusions of Law, and Judgment in favor of Plaintiffs/Petitioners on December 29, 1977 (Appendix C, pp. 68 *et seq.*). It held that "Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation" (Appendix C, p. 74). After reviewing the legislative history of 25 U.S.C. 398c., the District Court further found that Congress intended therein to allow the states and local authorities the exclusive right to tax oil and gas production from Executive Order Reservations and, therefore, held this Act preempted tribal taxation. In enjoining the defendants from collecting the Jicarilla Tax, the Court declared the tax to be illegal, unconstitutional, invalid and void (id., p. 75).

A divided Court of Appeals for the Tenth Circuit reversed the District Court, holding that the Tribe had the power to tax non-Indians as an attribute of inherent sovereignty, since no treaty or act of Congress specifically authorizes the exercise of such taxing power (Appendix A). In its reversal, the Court directed entry of judgment in favor of the tribe without considering the sources or attributes of the inherent sovereignty originally held or still retained by the Jicarilla Apache Tribe or remanding the case for presentation of evidence on the issue.

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[1] The Court found, *inter alia*, that if valid, the Jicarilla Tax combined with the State severance taxes would create a tax burden of more than 29% of the price of old gas, and over 12.5% of the price of old oil (Appendix C, p. 73), and that it would discriminate against and constitute a multiple burden upon interstate commerce.

The Court found that while the Commerce Clause limits the power of Indian tribes the Jicarilla oil and gas severance tax is not in violation thereof (Appendix A, p. 15). The Tenth Circuit did not otherwise address the protection afforded by the Constitution of the United States to non-Indians operating on Indian lands and dealing with tribes.

Finally the majority of the Court of Appeals held that 25 U.S.C. 398c. was not preemptive of the Jicarilla severance tax even though it granted the states the express authority to tax oil and gas produced on Executive Order Reservations.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents legal issues of first impression, having far ranging social, political, and economic consequences for both Indians and non-Indians. The question of whether an Indian tribe can tax non-Indians producing oil and gas under leases approved by the Secretary of the Interior has not been decided by this Court. That this is an issue of first impression was expressly recognized by the Court of Appeals for the Tenth Circuit (Appendix A, p. 9).

The decision of the Court of Appeals in this case can have far-reaching consequences. It is especially important that the issues in this case be considered since this Court's decisions in *Washington* v. *Confederated Tribes of the Colville Reservation* — U.S. —, 48 U.S.L.W. 4688 (June 10, 1980), *White Mountain Apache Tribe* v. *Bracker*, — U.S. —, No. 78-1177 (June 27, 1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, — U.S. —, No. 78-1604 (June 27, 1980), have laid down new guidelines since the

Court of Appeals decision herein. In *Colville* this Court held that Indian tribes have the power to levy and collect tribal taxes on cigarettes. Since Indian reservations contain a very significant portion of this country's future energy reserves,[2] it is important for this Court to determine whether the development of this energy "significantly involves the tribes" or is a problem national in scope. If Indian tribes have the power to tax this energy production without coordination with, or limitation by, the state or federal governments, they clearly have control over an area "significantly involving" the nation as a whole.[3] More importantly, *Colville* did not squarely present the fundamental question raised here as to the far-reaching constitutional implications of tribal sovereignty.

If, as Petitioners contend, Indian "sovereignty" can exist only under the mantle of federal sovereignty, it is important for this Court to determine whether Indian tribes can tax lessees operating under valid oil and gas leases approved by the Secretary of the Interior. While Indian tribes have been held to have the "inherrent tribal power to exclude non-Indians or impose conditions on those permitted to enter (*Colville, supra* at 48 L.W. 4674) once the tribe has agreed to the consideration specified.

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[2] As long ago as 1974, Indian oil and gas leases covered a collective acreage of 4,187,644 and produced 30,685,000 barrels of oil and 125,080,000 mcf of gas. It is estimated that coal under Indian reservations could provide more than 50 billion tons, or 10% of the nation's future needs, and that uranium reserves located on Indian Reservations constitute about two-thirds of all uranium reserves on federal land. Bureau of Competition, *Report to the Federal Trade Commission on Leasing on Indian Lands*, 11, 17 (October 1975).

[3] That tribal economies have not traditionally been based on oil and gas production and that regulation of the country's energy supply is a national problem, was recognized by state officials long ago. *See, e.g.* Allen, *State Conservation of Oil and Gas*, 5 Rocky Mtn. Min. L. Inst. 59, 70 (1960).

in a federal lease, additional tribal taxation raises significant legal issues.

The Court of Appeals below recognized that the questions involved in this case were indeed "important" questions. The matter was first heard by three members of the Court of Appeals. Prior to a decision being rendered, however, the Court of Appeals, *sua sponte*, set the issue of whether Indian sovereignty included the power to tax non-Indians, for rehearing *en banc* (Appendix J). Since the court found this a case of first impression, it may be fairly assumed that the rehearing *en banc* was ordered because of the issues involved, as provided by Rule 35, Federal Rules of Appellate Procedure.

The importance of the present case is indicated by the fact that amici briefs were filed before the Court of Appeals on behalf of the States of New Mexico, Utah, Montana, North Dakota, and Wyoming in opposition to the tribal tax. Amici briefs were filed on behalf of the Navajo Tribe, the National Congress of American Indians, the Arapahoe Tribe of the Wind River Reservation, Wyoming, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes, in support of Respondents.

While this Court has dealt with the concept of Indian sovereignty many times, it is clear from the continuing flood of cases that there still exists a fundamental unresolved question of constitutional law as to the limits which must be placed on the previously enunciated doctrine of tribal sovereignty. The applicability of restrictions imposed by the Constitution as well as those flowing from tribal dependent status are significant issues herein as criminal and quasi-criminal sanctions enforcing tribal taxes against non-Indians are involved. While the extent of tribal sov-

ereignty was considered in specific limited factual situations in each of the cases recently decided by this Court, the limits of tribal power over non-Indians and the rights of non-Indians when confronting tribal authority were not decided.

The limits on tribal authority over the property and lives of non-members doing business with Indians tribes is, therefore, an issue which demands this Court's immediate attention.

The decision of the Court of Appeals in this case can have far-reaching consequences.[4] Based, as it was, solely on a finding of "inherent sovereignty" it will open a new flood of litigation concerning the right of Indians to control the property and lives of non-Indians. If the opinion is allowed to stand, other tribes will take it as a signal that they, too, are free to impose energy taxes on non-Indians.[5] The validity of one such tax is already before the Court of Appeals for the Ninth Circuit[6] and other challenges to various forms of Indian taxation of nonmembers are being litigated in numerous District Court actions.[7] According

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[4] Again, recognizing the reference in *Colville* to "Indian sovereignty," Petitioners respectfully submit that the Court there was not faced with, and did not address, the questions raised here or the full constitutional consequences of tribal sovereignty.

[5] In reliance on the Tenth Circuit Court's opinion in this case, the Shoshone and Arapahoe tribes in Wyoming have reasserted their severance tax ordinance on oil and gas production, challenged in *Conoco Inc., et al.* v. Shoshone and Arapahoe Tribes, *et al.*, No. C-80-0181 (D. Wyo.).

[6] *Salt River Project Agricultural Improvement and Power District* v. *Navajo Tribe of Indians*, 9th Cir. No. CA78-3492.

[7] *Arizona Public Service Company, et al.*, v. *Cecil Andrus, et al.*, No. CV 78-238-C (D.N.M.); *Southland Royalty Company*, v. *Navajo Tribe of Indians*, C-79-0140 (D.Utah); *Amoco Production Company* v. *Peter MacDonald, et al.*, CV-79-155-B (D.N.M.); *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*,

to the amicus brief filed below by the National Congress of Indians, in 1978 at least 55 tribes were imposing various forms of tribal taxes on non-Indians.

1. Do Indian Tribes Have the Power to Tax Non-Members as a Condition For Remaining on the Reservation Under Pre-Existing Contracts?

The majority opinion of the Court of Appeals framed the question of tribal jurisdiction over the non-Indian Petitioners as "the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty." (Appendix, p. 13). The Court of Appeals held that "the tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers." (Appendix, p. 15).

Petitioners submit the Court of Appeals below confused the sovereignty of the United States government with the proprietary rights of Indian tribes by referring to the power to exclude or condition entry retained by any property owner as a "sovereign power." In attempting to excavate the legal foundation for the tribal power to tax non-Indians, the Court of Appeals majority said:

> "But *two different sovereign powers* have been relied upon — the power to tax, *e.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude non-members from the reservation and set the terms upon which such persons could

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et al., CV-79-383-M (D.N.M.); *Blackfeet Tribe of Indians* v. *State of Montana, et al.*, CV-78-61 GF (D. Mont.); *Conoco Inc. et al.* v. *Shoshone and Arapahoe Tribes, et al., supra; Kerr-McGee Corp.* v. *Navajo Tribe of Indians, et al.* CIV 80-247-PHX-wpc (D. Ariz.); *Union Oil Co. of Calif.* v. *Peter MacDonald, et al., CIV* 79-738 (D.N.M.).

> enter and do business therein. *E.g., Buster* v. *Wright*, 135 F. at 950." (emphasis supplied) (Appendix A, p. 13).

In discussing the origins of tribal sovereignty the Court of Appeals purported to find a "commonly shared presumption of Congress, the Executive Branch, and the lower federal courts . . . that the tribes retain the power to levy a tax that falls upon non-members doing business on the reservation." (Appendix A, p. 12). As the earliest pronouncement of the Executive Branch cited by the Court of Appeals indicates, such tribal power was generally traced to proprietary rights. In 18 Op. Att'y Gen. 36 (1884), Attorney General Phillips compared the tribes to proprietary innkeepers and made it clear their taxation powers did not apply to persons rightfully on the reservation:

> "In the absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor . . . I submit that, whatever this may mean, it does not limit the right of these tribes to pass upon the question, who . . . shall share their occupancy, and upon what terms. . . . The serious words 'jurisdiction' and 'self-government' are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who became his fellow occupants." 18 Op. Att'y Gen. at 36-7 (1884).

The proprietary foundation of tribal authority to tax is important in the instant case because the Jicarilla Tribe clearly did not have the right to impose a license fee as a condition on Petitioners' right to enter tribal lands or engage in business thereon. Petitioners had executed leases with the Jicarillas long before any Jicarilla tribal taxes

were conceived or imposed. These leases set specific bonus, rental and royalty payments to be made by the Petitioners to the Tribe and such provisions were expressly approved by the United States Secretary of the Interior.

Tracing the source of tribal authority to tax to the power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing sovereign government at the time the Constitution was signed. As Chief Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression. (Appendix A p. 32). When the United States acquired the New Mexico territory from Mexico in the 1848 Treaty of Guadalupe Hidalgo, there was no existing Jicarilla governmental authority. (Appendix A p. 30-33). Any governmental sovereignty possessed by Jicarillas must, therefore, have been expressly granted by the United States subsequent to acquisition of this territory.

These historical limitations on Jicarilla sovereignty, articulated so cogently in Judge Seth's dissent, are completely consistent with the construction by this Court in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States,* 136 U.S. 1 (1890) of the effect of the Treaty of Guadalupe Hidalgo upon the territory annexed. In *Latter-Day Saints,* this Court found that from the moment the United States acquired lands from Mexico by virtue of the Treaty of Guadalupe Hidalgo, the United States was the only sovereign in the territory and all governmental power derived from that source:

> "Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any

> such right of sovereignty over them; no other country *or government* had any such right. These propositions are so elementary, and so necessarily follow from the conditions of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident." 136 U.S. at 42-3. (emphasis supplied).

It is clear that this Court intended the same rule to apply to tribal governments since only four years prior to the rule as enuciated in *Latter-Day Saints,* this Court had decided *United States* v. *Kagama,* 118 U.S. 375 (1886). Indeed, this Court recognized the difficulties of integrating tribal sovereignty into the dual Federal-State system created by the Constitution in *White Mountain Apache Tribe* v. *Bracton,* — U.S. —, (No. 78-1177, June 27, 1980). In recognizing the continuing validity of *Kagama,* Justice Marshall, speaking for the Court opined:

> "The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 173, (1973), quoting *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886)."

Petitioners respectfully submit that this Court discussed Indian taxation authority in *State of Washington* v. *Confederated Tribes of the Colville Indian Reservation,* — U.S. —, 48 U.S.L.W. 4668 (1980) fairly raised only the question of the applicability of state cigarette and motor vehicle taxes on Indian reservations. *Colville* involved state sales taxes by the State of Washington against nonmembers making purchases of cigarettes and tobacco on

the reservation, and motor vehicle taxes on tribal members residing on the reservation. In *Colville,* the lower court ruled against the applicability of the state taxes to non-members on the reservation. This Court reversed in this respect, upholding the authority of the state not only to impose the taxes on non-members on the reservation but also to require the tribes to keep records for and collect the state taxes and to assert state civil and criminal jurisdiction over the Indian tribes to enforce the state taxes. This Court affirmed the lower court in *Colville* only with respect to denying applicability of the state motor vehicle tax on tribal members, quite a different question than those presented here with regard to Indian taxation of non-members.

Mr. Justice Rehnquist in *Colville, supra,* recognized the lack of a coherent doctrine on the question of Indian taxation and turned again to the principle of federal preemption as the basis for analysis of the issue. He pointed out that *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), did not resolve to what extent residual Indian sovereignty in the total absence of federal treaty obligation or legislation would still be recognized. 48 U.S.L.W. 4680, and note 2.

In *United States* v. *Wheeler,* 435 U.S. 313 (1978), this Court found that Indian tribes do not possess sovereignty to the same extent or from the same source as that of the United States Government. The Court pointed out that "the sovereignty that the Indian tribes retain is of a unique and limited character." 435 U.S. 323. Justice Stewart, in the Court's unanimous opinion, described the area of sovereignty necessarily withdrawn as a result of dependent tribal status:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those

> involving the relations between an Indian tribe and nonmembers of the tribe . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 326.

While this Court stated there was no implicit divestiture of the tribe's inherent powers in *Colville*,[8] that statement was grounded on the lack of an overriding federal interest that would be frustrated by tribal taxation in that case. 48 U.S.L.W. at 4673. To the contrary, in the present case there is such an overriding interest. It is an issue of vital significance to the Western states whether Indian tribes will be allowed to tax the same mineral production already taxed by the States under congressional authority, since multiple taxation here could well overburden mineral production to the point of abandonment or confiscation by the tribes, *sans tax*. This presents an issue of considerable federal significance.

The Court of Appeals below, erroneously attempted to predicate Indian sovereignty on the Commerce Clause of the United States Constitution. The majority of the Court of Appeals implicitly, and Judge McKay's concurrence explicitly, assume that by mentioning "Indian tribes" in the Commerce Clause of the Constitution, the founding fathers intended such tribes to assume general governmental authority within the territorial boundaries of their reservation. (Appendix, p. 10, 15, 25). This Court rejected any such

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[8] *Colville*, relying on *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979) expressly upheld the state's assumption of both civil and criminal jurisdiction over the tribes — a result incongruous with the notion of tribal sovereignty urged by the Apaches and supported by the Court of Appeals here.

interpretation of the Commerce Clause in *United States* v. *Kagama,* 118 U.S. 375 (1886), where it concluded that there is no legitimate sovereignty contemplated for Indian tribes within the Constitutional framework. In a passage quoted with approval in *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978), the Court said:

> "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States or of the States of the Union. There exists within the broad domain of sovereignty but these two." 118 U.S. at 379.

The Supreme Court's recognition of the fact the Constitution fails to reflect any general governmental power for Indian tribes is also supported by historical documents indicating its draftsmen did not contemplate a general governmental role for Indian tribes. For discussion, see Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Constitutional License?* 51 Notre Dame Lawyer, 600 (1976).

To grant Indian tribes the general governmental authority bestowed by the Court of Appeals would directly contravene the entire dual system of federal-state government established by the Constitution[9]. Dissenting from the majority below, Chief Judge Seth noted that the United States and the states are the only two governmental entities contemplated by the Constitution. To allow Indian tribes sovereignty within the territorial boundaries of a state, but not subject to state control, is inconsistent with the federal concept of our Constitutional system:

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[9] Article I; Section 1; Article II, Section 1; Article III, Section 1; Article IV; Article V; Article VI; Article VII; and the Tenth Amendment (Appendix E).

> "The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities, and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government, under its residual powers, retained no authority to create governmental bodies within the states." (Appendix A, pp. 33-34).

To grant Indian tribes the sovereignty over non-Indians urged by the majority of the Court of Appeals would be to elevate such tribes to a level equal to or greater than that of States of the Union. In his concurring opinion, Judge McKay, equating tribes with federal municipalities, expressly recognized the implications of the majority position in attributing "police powers, regulatory power, or fiscal powers" to Indian tribes. (Appendix, p. 28). This approach would require that reservation enclaves be carved out of the existing states to accommodate 287 tribal governments[10]. The states would have absolutely no control over the exercise of governmental authority within those Indian enclaves existing within their borders. As this Court has expressly recognized in *United States* v. *Kagama*, 118 U.S. 375, 381 (1886), the semi-independent position of Indian tribes to regulate their internal and social relations does not give tribes governmental power to the same extent as that granted the states. Cf. *White Mountain, Supra,* Slip. Op. pp. 5, 6 The policy purposes underlying the doctrine of "tribal sovereignty," including *inter alia* the preservation and development of tribal customs and religion, may be fully achieved without subjecting other Americans to tribal jurisdiction. Petitioners respectfully submit our federal system was not

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[10] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, at 65, n. 21 (1978).

designed to, and cannot, accommodate such broad governmental authority by an entity not recognized by the Constitution.

2. If Indian Tribes Have Taxation Authority Over Non-Indians, Has Such Authority Been Preempted on Executive Order Reservations by 25 U.S.C. § 398c?

The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. *White Mountain Apache Tribe* v. *Bracker*, — U.S.—, (No. 78-1177, 1980). Unquestionably one of the critical bellwethers in determining the interests of the states and Indian tribes in regulating the activities of non-Indians on a reservation is the intent of Congress. *Colville*, 48 U.S.L.W. 4674, 4676, 4679. Petitioners submit such Congressional intent to preempt any tribal taxation power possessed by the Jicarillas is expressed in 25 U.S.C. 398c.[11]

Although treaties were signed by representatives of the United States Army and Jicarilla Apache leaders, none were ever ratified by Congress. In 1871, by the provisions of 25 U.S.C. § 71, Congress recognized the tribes were no longer regarded as sovereign nations but were regulated by Congressional statute. *De Coteau* v. *District County*

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[11] 25 U.S.C. § 398c. reads in full:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided*, that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Court, 420 U.S. 425, 432 (1975) Cf. *Organized Village of Kake* v. *Egan,* 369 U.S. .60, 72 (1962). Since no Jicarilla treaty was ratified by Congress prior to 1871, when it terminated recognition of the remaining recalcitrant Indian bands, a series of Executive Orders relating to the Jicarillas was promulgated and revoked. (*See,* Seth Dissent, Appendix A, pp. 34-35 and Appendix H). Finally, a location was chosen and a reservation created for the Jicarillas by Executive Order.

In light of the purposes of 25 U.S.C. § 71 and the marked change in attitude it represented, Congress adopted a somewhat hostile attitude toward reservations created exclusively by the President after 1871. It is from this historical perspective that "the broad policies that underlie" 25 U.S.C. § 398c. must be judged. *White Mountain Apache Tribe* v. *Bracker, supra,* slip opinion at 8. *Cf. United States* v. *Sioux Nation* — U.S. —, slip op. at 431 June 30, 1980). During the long debate on this Act, Senator Bratton, who subsequently became a judge on the Tenth Circuit Court of Appeals, explained the legal infirmities of this Executive Order process:

> "Upon the question of this title, the Executive has set apart these reservations by proclamation from time to time since 1871 without any express authority from Congress. It is a practice that has been followed, and it has been recognized inferentially or indirectly from time to time by Congress. However, when we deal with the question of title to these lands, we are confronted with this situation: We have about 22,000,000 acres of land that at one time belonged to the United States. If the government does not own the title now, it is by virtue of presidential proclamations divesting the government of that title and vesting it in the Indians.
>
> "The Constitution provides that — 'The Congress shall have power to dispose of and make all needful

> rules and regulations respecting the territory or other property belonging to the United States.' If the Indians own the title to these lands so that they own the minerals under them, the President has vested that title in them by presidential proclamation in the face of a Constitutional provision vesting that authority in the Congress." 67 Cong. Rec., 10995 (1926). (*See, also* 67 Cong. Rec. 10915; 10910 (1926)).

That Congress would not have condoned tribal taxation of non-Indians is clear from the history and debate surrounding the passage of 25 U.S.C. § 398c. This statute was adopted as a compromise between those who felt the states were clearly entitled to all the royalties on oil and gas severed from Executive Order Indian reservations and those who felt the tribes should get a portion of such royalties[12]. Indeed a recent Congressional study recognized that Indians have traditionally received royalties rather than taxes as revenue from mineral production on their land and implicitly acknowledged that 25 U.S.C. 398c. should be repealed in order to allow tribal taxation[13].

Petitioners submit, therefore, that if Indian tribes have the inherent power to tax non-Indians generally such power has been preempted by Congress as to oil and gas taxation on Executive Order Indian Reservations[14].

Even if Congress did not intend 25 U.S.C. 398(c) to grant the states exclusive taxation authority over oil and gas produced from Executive Order Reservations, the overall Congressional attention to Indian leasing indicates a pre-

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[12] 66 Cong. Rec. 999, 2234, 2739, 5433-4, 67 Cong. Rec. 10912, 10915-19, 10995, 11397, 68 Cong. Rec. 4569.

[13] Final Report of the American Indian Policy Review Commission at 81 344-45.

[14] See Barrett, J., dissent, Appendix, p. 52, tax non-Indians Mineral Lessees, 19 Nat. Res. J. 969 at 991 (1979).

emptive intent. Federal Regulations govern every minute detail of Indian leasing. This federal regulatory scheme, therefore, totally preempts any tribal tax not recognized therein. The Secretary of the Interior is given broad supervisory authority over tribal lands and assets under 25 U.S.C. § 464. Under the terms of 25 U.S.C §§ 81 and 415, the Secretary is charged with the duty to approve or disapprove contracts and leases with the Indian tribes. Under 25 U.S.C. § 396d, "all operations under any oil, gas or mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior." The Secretary has exercised these statutory mandates in Part 171 of Title 25 of the Code of Federal Regulations. These regulations govern, among other matters, the method of acquiring leases from the tribes (§§ 171.1a to 171.9), the term of such leases (§ 171.10), manner of payments (§ 171.12), rates of rentals and royalties under oil and gas leases (§ 171.13), the time for making royalty payments (§ 171.16), waste prevention (§ 171.19), restrictions on and approval of oil and gas operating plans (§§ 171.20 and 171.21), assignment of lease interests (§ 171.26) and cancellation of leases (§ 171.27). Most specifically the Code of Federal Regulations prohibits any unilateral increase in the remuneration required under the leases. 25 C.F.R. 171.28.

The comprehensive character of federal reguulation over oil and gas operations on tribal lands leaves little, if any, room for regulation by Indian governmental entities. When the laws of an inferior sovereign "touch upon" the area of a comprehensive federal policy, the latter "may not be set at naught or its benefits denied" by the laws of the lesser or dependent sovereign. *Sears, Roebuck & Co.*, v. *Stiffel Co.*, 376 U.S. 225, 229 (1964). In *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), this

Court addressed the question of whether Congress's delegation of authority to the Commissioner of Indian Affairs over trading on the reservations preempted state taxation of reservation traders. The Court reviewed the Commissioner's "detailed regulations" concerning traders and concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690.

The Court held:

> "Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's . . . because Congress in the exercise of its power granted in Article 1, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." Id. at 691 n.18.

As in *Warren Trading Post*, the Secretary's "apparently all-inclusive regulations" over reservation oil and gas operations, together with the statutes that authorize them, would seem in themselves sufficient to show that Congress has taken the matter so fully in hand that no room remains for additional tribal taxes "imposing additional burdens" on oil and gas lessees. "There is no room for these taxes in the comprehensive federal regulatory scheme." *White Mountain*, — U.S. — (No. 78-1177, 1980), slip opinion pp. 11-12. "The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of [oil and gas] production". *Ibid.*

3. If Indian Tribes Have Governmental Authority Over Non-Indians, Must Non-Indians Be Accorded the Full

Range of Constitutional Protections Against Abuses of Tribal Authority?

A further important question of federal law which has not been, but should be, settled by this Court is the nature and extent of Constitutional guarantees which must be extended non-Indians as a protection against the excesses of any sovereignty found to exist in Indian tribes. Petitioners submit that this Court's decisions holding that Indian tribes need not extend constitutional rights to their own members support the proposition that Indian tribes were not intended to have coercive governmental authority over non-Indians. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); for example, this Court recognized:

> "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." 436 U.S. at 56.

The facts involved and language employed in *Santa Clara* emphasize the lack of Constitutional inhibitions on tribal government apply only when the tribe is dealing with its own members in areas traditionally regulated by Indian custom. A careful review of the opinion in *Santa Clara* leads to the conclusion that this Court recognized that Constitutional restraints upon tribal government were not necessary because tribal government has authority only on internal matters traditionally governed by Indian practices and customs. Justice Marshall, speaking for the Court, clearly articulated the parameters of tribal authority as involving strictly internal tribal matters.

> "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although no longer 'possessed of the full attributes of sovereignty,' they

> remain a 'separate people, with the power of regulating their internal and social relations." 436 U.S. at 55.

Given this Court's holdings that Indian tribes are not constrained by the Constitution, two alternatives exist: (1) either such tribes cannot have authority over non-Indians; or (2) non-Indian citizens can be totally deprived of their Constitutional rights by Indian tribes. Petitioners submit that this Court's decision in *Santa Clara* supports the first alternative.

Logic dictates that since tribal customs and traditions differ from the Anglo-American concept of jurisprudence, the United States Constitution need not be injected into the relationship between tribal members and their government. *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971). To hold, however, that non-Indians lose their Constitutional rights merely by entering an Indian reservation would create 287 enclaves within the territorial boundaries of the United States, on which non-Indian citizens can be totally deprived of their Constitutional rights. This contravenes the long established principle that the Constitution is binding on all within the territory of the United States and does not contemplate such exempt enclaves. *Southern R. Co.* v. *Greene,* 216 U.S. 400, 412 (1910); *cf. Healy* v *James,* 408 U.S. 169, 180 (1972).

If Indian tribes are to be given general governmental authority over non-Indians, such tribes must be subject to all the limits on governmental authority provided in the Constitution[15]. Without such Constitutional restraint, tribal

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[15] Officials of the Executive Branch charged with supervision of Indian tribal government have long recognized Indian self-government must operate within the limitations of the Constitution. *See, e.g.* Letter from Under Secretary Hatfield Chilson quoted in *Oliver, Legal Status of American Indian Tribes,* 38 Ore. L.R. 193 at 243 (1959).

action could expropriate property worth hundreds of millions of dollars and banish non-Indian citizens rightfully on reservations[16]. As this Court recognized in *Oliphant*, tribal jurisdiction over non-Indians raises enormous Constitutional problems. 435 U.S. at 211-12. In *Oliphant*, this Court rejected the argument that tribal regulations could be applied to non-Indians without any regard for their Constitutional rights:

> "Since the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty . . ." *Oliphant* v. *Suquamish Indian Tribe, supra.* 435 U.S. at 210.

In *Colville, supra,* this Court again recognized that any "exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government," when the tribes do not accord the full protections of the Bill of Rights to non-Indians. 48 U.S.L.W. at 4673.

There is no Constitutional value more central to our notion of political justice than that subjection to governmental power presupposes the right to petition and participate in that government on an equal basis. Indeed this Court has very recently reiterated that, "In

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[16] When the enforcement of such tribal taxation involves the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property they require the criminal jurisdiction prohibited to the tribes. *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976); cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 1922). The Navajo Tribal Counsel recently recognized this fact in arguing in favor of the tribes power of banishment and expropriation of property, "The power to tax must, by necessity, include the power to enforce the tax or it is meaningless: a 'voluntary' tax is no tax at all." *Kerr McGee Corp.* v. *Navajo Tribe of Indians*, Civ 80-247-PHX-WPC Memorandum In Support of Motion for Summary Judgment p. 17.

this nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall,* 440 U.S. 410, 426 (1979). Participation in the deliberations and proceedings of an Indian tribal council is, however, unquestionably a right denied non-Indians. This principle can also be seen in this Court's recent decisions which guarantee equal franchise to those substantially affected by governmental action *See, e.g., Cipriano* v. *City of Houma,* 395 U.S. 701 (1969). To make a non-Indian subject to tribal government, when he is completely disinfranchised by the tribe would violate the Constitutional concept of equal protection. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970); *Terry* v. *Adams,* 345 U.S. 461 (1953).

The Court of Appeals would subject non-Indians to tribal governmental power without allowing them any right to petition or participate in tribal government. Chief Judge Seth, in dissent, clearly recognized this flaw in the majority reasoning, saying:

> "The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundations of governmental authority as it exists in the United States." (Appendix A, p. 34).

Judge Seth also observed governmental "sovereign power" should not be attributed to Indian tribes precisely because of their failure to allow non-members to participate:

> "The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the Tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on Tribal membership. Perhaps this is how it should be for self-determination; however, such a group of Tribal mem-

bers excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided, authority exists to govern." (Appendix A, p. 35).

4. Does the Tribal Tax Unduly Burden Interstate Commerce?

The Jicarilla tax would also place a multiple burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States. The Court of Appeals majority opinion recognizes that New Mexico imposes four separate severance taxes upon the same oil and gas to which the Jicarilla Severance Tax would apply. (Appendix, p. 19). The majority, however, dismissed the multiple burden argument by stating:

> "It is beyond question that no state, *with the exception of New Mexico,* has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support a levy of a severance tax on lessee's occupation. There is thus no threat of a multiple burden emanating from this tax *unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause.* That New Mexico may be able to impose an identical tax on leases does not implicate federal interest in maintaining the flow of interstate commerce at all, we believe." (emphasis added) (Appendix A, pp. 19-20).

Petitioners respectfully submit that the Court of Appeals ignores the Constitutional proscription against multiple burdens upon interstate commerce. The majority and concurring opinions give Indian tribes the powers of a local government. If an Indian tribe is indeed analogous in governmental power even to a local government, then it is

clear that such tribal taxation must be subject to dual Commerce Clause scrutiny. *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951). Taxation of a single event by more than one government works to the advantage of local commerce because such local commerce cannot be so frequently taxed. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938).

If, as the Court of Appeals held, the Jicarilla tax is levied on the incident of severance of the oil and gas from the Jicarilla Reservation, then the Jicarilla tax constitutes an impermissible burden upon interstate commerce because New Mexico taxes the same "local" event. The Court of Appeals dismissed this burden since only two entities imposed such taxes on a single event. This highlights the pernicious effect of the majority's holding, which creates impermissible governmental enclaves within the territorial boundaries of the existing states. The creation of these "local" governments within the existing states, but not subject to the jurisdiction thereof, will allow "local taxes" by both tribal and state governments. The problem may be illustrated by the fact that California alone has 66 Indian reservations within its borders. Arizona's mere 17 reservations occupy territory larger than 13 of the States, and cover one-third of Arizona's 114,000 square miles[17]. Such widespread establishment of Indian taxation would effectively destroy existing State taxation. The majority opinion below creates a unique legal situation where several totally autonomous sovereign governments exist within the borders of a State of the Union and all can tax without coordination or restriction, at least until the combined level reaches confiscation.

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[17] Federal and State Indian Reservation and Indian Trust areas, U.S. Department of Commerce (1974).

CONCLUSION

Petitioners respectfully submit certiorari should be granted to settle the important questions of federal law raised herein and to bring the judgment and opinion of the Court of Appeals below into conformity with the applicable decisions of this Court governing Indian tribal sovereignty over non-Indians.

Dated: 1 July 1980.

Respectfully submitted,

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80-11

Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS,
d/b/a MERRION AND BAYLESS, JEROME T. McHUGH,
CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION,
CONSOLIDATED OIL AND GAS, INC.,
SOUTHLAND ROYALTY COMPANY, TESORO
PETROLEUM CORPORATION, AMERADA HESS CORPORATION,
SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC.,
J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY
(now CONOCO INC.),
ATLANTIC RICHFIELD COMPANY,
PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY,
GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION,
AND OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE
TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIOARAI

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APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, decided February 22, 1980.

Revised Page 6 of Opinion, entered April 25, 1980.

2-22-80 78-1154 — 78-1251

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1154

J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, and Gulf Oil Corporation,

Plaintiffs-Appellees,

v.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, and Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

Mobil Oil Corporation, and Oxy Petroleum, Inc.

Intervenors-Appellees.

No. 78-1251

Amoco Production Company and Marathon Oil Company,

Plaintiffs-Appellees,

v.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Nos. 77-292P & 77-343P)

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George P. Vlassis (Lawrence A. Ruzow, Katherine Ott, Gary Verburg, of counsel) of Vlassis, Ruzow & Crowder, Phoenix, Arizona, filed an amicus curiae brief for the Navajo Nation.

Reid Peyton Chambers of Sonosky, Chambers & Sachse, Washington, D. C. and Marvin J. Sonosky of Washington, D. C., of counsel, filed an amicus curiae brief for the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes.

Charles A. Hobbs of Washington, D. C., filed an amicus curiae brief for National Congress of American Indians,

Inc., the Arapaho Tribe of the Wind River Reservation, and the Three Affiliated Tribes of The Fort Berthold Reservation.

Toney Anaya, Attorney General, and Jan Unna, Special Assistant Attorney General, the State of New Mexico, Santa Fe, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Robert B. Hansen, Attorney General, Richard L. Dewsnup, Dallin W. Jensen, Frank V. Nelson, Assistants Attorney General, of the State of Utah, Salt Lake City, Utah, filed an amicus curiae brief for the State of Utah.

John J. Rooney, Acting Attorney General, the State of Wyoming, Cheyenne, Wyoming, Alan I. Olson, Attorney General, the State of North Dakota, Bismarck, North Dakota, and Mike Greeley, Attorney General, the State of Montana, Helena, Montana, filed an amicus curiae brief for the States of Wyoming, North Dakota and Montana.

Before SETH, Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN, Circuit Judges (en banc).

LOGAN, Circuit Judge.

This appeal arises out of two suits, consolidated for trial, brought by appellees against the Jicarilla Apache Tribe and its Tribal Council (the Tribe). Appellees (lessees), who are non-Indians, produce oil and gas from within the Tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior. After the Tribe enacted an oil and gas severance tax to be measured by production from oil and gas wells within the reservation,

lessees sued the Tribe and Secretary of the Interior, Cecil Andrus,[1] seeking a declaratory judgment and injunction that would prohibit enforcement of this tax. After a nonjury trial, the judge permanently enjoined enforcement declaring the tax "illegal, unconstitutional, invalid and void."

The issues on appeal are whether,

(1) the district court had jurisdiction over the claims against the Tribe and the Secretary of the Interior,

(2) the Tribe has the inherent power to levy the severance tax,

(3) the tax violates the Commerce Clause of the United States Constitution, and

(4) Congress preempted tribal taxation.

The Jicarilla Apache Tribe is an Indian Tribe occupying an executive order reservation in northwestern New Mexico. The Tribal Council is the legislative arm of the Tribe's government. In 1968 the Tribe adopted a revised constitution pursuant to the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476, 477. Article XI of that constitution provides, in pertinent part,

> Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department

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[1] In one of the essentially identical cases Gwendolyn Velarde, Treasurer of the Tribe, and Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, were named as individual defendants. Prior to trial Martinez was dismissed from the suit without prejudice.

> of the Interior and the restrictions established by this revised constitution.
>
> . . . .
>
> (e) Taxes and Fees. The tribal council may levy and collect taxes on fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

The revised constitution was approved by the Under Secretary of the Interior in 1969.

In 1976 the Tribal Council adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." The operators are required to pay the tax, which is due at the time of severance and is payable monthly. The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation." "Royalty gas, oil or condensate, taken by the Tribe in kind, and used by the Tribe" is exempt from taxation. The Secretary, through the Acting Area Director of the Bureau of Indian Affairs, formally approved the tribal ordinance in December of 1976.

Among the trial court's findings are the following: Approximately 80% of the oil and gas produced by lessees is shipped interstate for sale outside the state of New Mexico; the tax would generate over two million dollars annually; the lessees would be able to pass the majority of the tax burden on to their customers; if the lessees are required to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells "would be required to shut down such wells resulting in a loss of natural resources

and an unjust return of the wells to the Jicarilla Apache Tribe"; and the tax burden on the price of oil and gas would be more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

Based upon these findings the trial court held that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empower the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple burden on interstate commerce in violation of the Commerce Clause.

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* At trial, however, lessees abandoned this contention. Thus, no finding was made concerning whether the Secretary acted beyond his statutory authority or unconstitutionally. Absent this determination, the suit is in reality against the United States, which has not waived its sovereign immunity from suit. *See* Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974). *See also* Califiano v. Sanders, 430 U.S. 99, 105-07 (1977) (APA is not an independent grant of federal jurisdiction). We therefore hold the trial court was without power to enjoin the Secretary of the Interior.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court

was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe cannot be sued absent consent. *See also* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Here the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court. The ordinance was approved by the representative of the Secretary of the Interior. The question is whether this constitutes effective consent.

We see no reason in principle or in law to conclude a Tribe that has taken advantage of Congress' encouragement to organize for purposes of providing for its common welfare under 25 U.S.C. § 476, has adopted a constitution, and has formally attempted to waive its sovereign immunity in this ordinance, may not do so. We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of Interior. We therefore hold the trial court had jurisdiction over the Tribe.[3]

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

[3] Even were we to conclude the ordinance did not constitute effective consent, it is clear that the court properly reached the merits in one of the cases consolidated for trial. Plaintiffs Amoco Production Company and Marathon Oil Company, in addition to naming the Tribe and Tribal Council as defendants, sued individually the tribal official charged with the enforcement and collection of the tax. The Tribe's immunity from suit does not extend to tribal officials; therefore the trial court properly heard this case. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

II

In treating the merits of this appeal, we first consider the basic question whether the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction. The tax instituted by the Tribe here is an excise or privilege tax imposed on the occupation of severing oil and gas from tribal land, measured by quantity produced. *See* Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934). *See also* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). Since no treaty or act of Congress specifically authorizes the exercise of such a taxing power, we must decide whether that power is among those "vested in any Indian Tribe or tribal council by existing law," Indian Reorganization Act of 1934, § 16, 25 U.S.C. § 476, *i.e.*, whether the Tribe has the inherent power to levy this tax. In making this determination, we recognize the fundamental principle that the power of taxation, which is essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819).

It has long been recognized that Indian tribes, although once self-governing political nations, no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, the tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the

exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation. Oliphant, 435 U.S. at 208-09; United States v. Wheeler, 435 U.S. 313, 323 (1978).

While the Supreme Court has not passed directly upon the question before this Court, it has determined that certain powers were not retained by the tribes upon their incorporation because of the superior interests of the United States. It has long been established, for example, that the tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Because of the United States' interest in protecting its external political boundaries, the tribes as sovereign entities may not deal with foreign nations. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). Most recently, the Supreme Court determined that the tribes also gave up the power to exercise criminal jurisdiction over non-Indians, on the ground the power of the tribes to restrict the personal liberty of United States citizens' conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

We do not find that tribal tax legislation in the context of this case necessarily and in every instance implicates a sovereign federal interest in the same way criminal adjudication, sale of tribal land, and governmental dealings with foreign nations does. The federal taxing power is in no way impinged; clearly the federal government can tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax. Nor is there a general sovereign interest in preventing persons from being taxed by governmental entities other than itself.

A national, if not sovereign, interest in preventing deprivations of property without due process is manifested in the Fifth and Fourteenth Amendments. In the context of taxing, however, that interest is implicated only in the extremely rare case in which the taxing power is so abused the result is in reality not a tax, "but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). *See also* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910). That is not the situation in the instant case.

Neither can we conclude that the "national interest in free and open trade" between the states, expressed by the Commerce Clause of the Constitution precludes tribal taxation. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). Just as the clause serves only as a limitation on state taxation powers, *id.* at 329, it limits but does not destroy tribal powers of taxation. *See* Part III, *infra.*

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any nonmembers of their tribe. *See* Wheeler, 435 U.S. at 326; Oliphant, 435 at 208-11. For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." 435 U.S. at 326. For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence

of inherent powers. The critical factor in the cases is whether important interests of the United States, other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private, voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than private, voluntary associations, United States v. Mazurie, 419 U.S. 544, 557 (1975), and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-323 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

Also persuasive are Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality. As early as 1823 the Court recognized in Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923), that voluntary transactions of nonmembers with the Tribes or their members within the confines of the reservation would subject that nonmember, at least regarding that transaction, to the laws of the tribe. *Id.* at 593. Similarly, Williams v. Lee, 358 U.S. 217 (1959), held that a state court was without jurisdiction to hear a simple contract action brought by a

nonmember against an Indian concerning a transaction entered into on the reservation. The Court's stated rationale was premised in part upon the territorial aspect of the tribe's right to self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted). *See also* United States v. Mazurie, 419 U.S. 544 (1975). While the territorial element of inherent tribal power is not necessarily exclusive, *see, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Thomas v. Gay, 169 U.S. 264 (1898), and may not exist in some circumstances, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), we do not think the decisions eliminate this aspect of tribal powers.

We are also persuaded by "the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts," Oliphant, 435 U.S. at 206, that the tribes retain the power to levy a tax that falls upon nonmembers doing business on the reservation. Prior to the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (the Act), which was intended to facilitate tribal self-government, one decision by the Supreme Court and three by the Eighth Circuit approved imposition of tribal taxes on nonmembers doing business on the reservation. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion*, 203 U.S. 599

(1906); Maxey v. Wright, 105 F. 1003 (8th Cir.), *aff'g* 3 Ind. Terr. 243, 54 S.W. 807 (1900); Crabtree v. Maxey, 54 F. 426 (8th Cir. 1893). The Attorney General of the United States also approved similar taxes. *E.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901); Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884).

The parties to this appeal forcefully dispute the characterization of these decisions — the Tribe argues these decisions involved the inherent power to tax; the lessees argue they merely support the proposition that tribes have the proprietary, but not sovereign, right to exact fees from persons desiring to enter the reservation and do business therein. From our reading of the cases and opinions, we conclude that the decisions were grounded upon tribal sovereignty, with the exception of Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884). But two different sovereign powers have been relied upon — the power to tax, *e.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business therein. *E.g.*, Buster v. Wright, 135 F. at 950. The Supreme Court in *Morris* v. *Hitchcock* appears to have recognized both theories. 194 U.S. at 389-93.

The case before us presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty. Thus, it seems important to ascertain whether particular treaties influenced the decisions discussed above. Although the United States did not always require tribes to give up the power to exercise civil jurisdiction over nonmembers and their property within the reservation, *see, e.g.*, Jurisdiction of the Courts of the Choc-

taw Nation, 7 Op. Att'y Gen. 174, 176 (1855), nearly all of these tribes had done so. *See, e.g.,* Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd,* 194 U.S. 384 (1904). Yet throughout the decisions is the sometimes explicit and sometimes implicit assumption that tribal exercise of power over nonmembers doing business on the reservation in connection with that business did not offend the interests of the United States and was a sovereign right retained by the tribes. Two cases decided by the Eighth Circuit after passage of the Act expressly upholding tribal taxes on the theory of the power of taxation share this assumption. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied,* 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

Congress also apparently recognized tribal power to tax nonmembers within the reservation when it passed section 16 of the Act, which confirmed the existence of sovereign tribal powers generally. In hearings conducted prior to passage of the Act, Congress was apprised of the holding of Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. 269-70 (1934). Solicitor Margold of the Department of Interior, in an opinion, considered the intent of Congress in its reference in section 16, to "all powers vested in any Indian tribe or tribal council by existing law." Among those retained powers, he concluded that

> [c]hief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may

> accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934). This opinion, virtually contemporaneous with the Act, is persuasive evidence that neither Congress nor the Department of Interior believed a tribal taxing power would conflict with the interests of the United States. *See also* United States Department of the Interior, Federal Indian Law 435-39 (1958); 1 Final Report of the American Indian Policy Review Comm'n 154-58, 178-82 (1977). Consistent with its interpretation of the Act, the Department approved the tax involved in this case. As the agency charged with construction of the Act in the course of its actual execution, the Department's conclusion that Indian tribes retain the power to levy a tax of the type involved here deserves great respect. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

Except for the dollar sums involved, which are irrelevant, *see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), we see no essential difference between the privilege taxes here levied and those approved by the Supreme Court in *Morris* v. *Hitchcock* and in the Eighth Circuit cases cited above. For all the reasons discussed above, we conclude that the Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers.

III

We now consider the argument that the severance tax violates the Commerce Clause. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. We believe the national interest manifested in the Commerce Clause is not sufficient to pre-

clude the tribes' power to tax, but this clause of its own force limits the power of the tribes as well as the states. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977). It has long been established that the tribes constitute a separate category within that clause. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831). Since the tribes are not "states," *see id.* at 16, United States v. Wheeler, 435 U.S. 313 (1978), and necessarily are located within the boundaries of one or more states, they are not subject directly to those doctrines implementing the phrase "among the states."

It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that this national interest is measured by traditional analyses. The trial court found the tax imposed by the tribe both discriminates against interstate commerce and constitutes a multiple burden on commerce. We treat first the discrimination question.

The trial court's stated reason for holding the tax discriminates against interstate commerce is that the tax "is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation." This reason, which simply tracks the language of the ordinance, can be interpreted in two ways.

The first interpretation is that the tax provides "a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). Although there actually is no Indian production here, the ordinance by its terms would apply to any operator engaged in severing the subject re-

sources within the reservation. Apparently, the trial court viewed the provision exempting "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as the requisite local preference. We disagree. Subjecting royalty products the Tribe would receive to its own tax would be a fruitless and wasteful act. We therefore think the exemption is permissible.

Second, in view of the trial court's finding that eighty percent of the hydrocarbons produced on the reservation entered interstate commerce, which we accept as true for purposes of this appeal, the court's conclusion of law can mean it believed the tax is to be levied on the privilege of engaging in interstate commerce itself. Were this correct, the standards of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), would be applicable.[4] However, it is settled that an

[4] The *Stevedoring* case, building upon *Complete Auto Transit* eliminated the distinction between direct and indirect taxation of interstate commerce when the tax is measured by gross proceeds. 435 U.S. at 743-51. With that distinction fell the *per se* rule forbidding taxation of interstate commerce. *Id.*; 430 U.S. at 287-89. A tax falling within the ambit of these cases is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. *See id.* at 287; 435 U.S. at 750-51. We need not decide whether a severance tax measured by quantity produced within a single jurisdiction falls within the ambit of this new doctrine. Obviously the questioned tax falls on activity — production — with a substantial nexus with the reservation. The tax does not raise the apportionment problem because it is measured by quantity, and as we have determined, it does not discriminate against interstate commerce. If the *Stevedoring* and *Complete Auto Transit* analysis applied, the only question is whether the tax is fairly related to services provided by the reservation. Lessees did not build a factual foundation in the record to challenge the tax on this ground, since they relied upon the rejected *per se* rule. Thus there is no basis on which to hold the tax invalid on this ground. *See* 435 U.S. at 750-51.

occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). *See* Dunbar-Stanley Studios, Inc. v. Alabama, 383 U.S. 537, 541 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). This is true even though the severed product is destined for immediate entry into interstate commerce, Arctic Maid, 366 U.S. at 204; Oliver Iron Mining Co., 262 U.S. at 177-78, and even though the cost of interstate commerce is increased. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 612 (1938). *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977). The Tribe's tax fits within this line of cases.

The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

The trial court also held the tax invalid as a multiple burden on interstate commerce, apparently because New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an oil and gas production equipment ad valorem tax. *See* N.M. Stat. Ann. §§ 7-29-1 to 7-29-22; *id.* §§ 7-31-1 to 7-31-25; *id.* §§ 7-30-1 to 7-30-26; *id.* §§ 7-34-1 to 7-34-20 (1978). The Supreme Court, in Western Live Stock v. Bureau, 303 U.S. 250 (1938), explained the basis for finding this type of violation of the Commerce Clause as follows:

> The vice characteristic of [local taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Id. at 255-56 (citations omitted) (emphasis added). Applying this analysis, we hold the trial court erred.

We first note that the focus is upon the type of tax that every state may impose with equal right. It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation. There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause. That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of

interstate commerce at all, we believe. Rather it raises two different questions — whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians, a question we do not reach, and whether a Congressional grant of authority to levy the state tax preempts tribal taxation, addressed in Part IV, *infra*.

We hold the federal interest in interstate commerce, manifested in traditional Commerce Clause analyses, does not limit the Tribe's power to impose this tax.

IV

We next consider whether Congress has preempted the exercise of the Tribe's power to levy the severance tax. The trial court held that by granting to the states the right to tax the production of oil and gas on executive order reservations, Congress intended to preempt similar tribal taxation. The basis of this ruling is 25 U.S.C. § 398c, which provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Emphasis in original). Section 398c was an integral element of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, which also settled then unresolved questions concerning the status of Indian mineral rights in executive order reser-

vation lands and granted to the Indians all the royalty, rental and bonus income from oil and gas leases on their reservations. *See id.* § 2, 44 Stat. 1347 (codified at 25 U.S.C. § 398b). *See also* SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926).

In construing this statute, we must apply the

> "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). See *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912); *Antoine* v. *Washington,* 420 U.S. 194, 199-200 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976). Fairly read, this statute does not by its terms preclude tribal taxation of lessees engaged in the business of producing oil and gas from within executive order reservations. Moreover, the legislative history, which reflects Congress' awareness of the need at that time for express authorization of state taxation of Indians and of non-Indians doing business with Indians on the reservation, does not show an express or implied intent to preempt tribal taxation. *See* H.R. REP. NO. 1791, 69th Cong., 2d Sess. 4 (1927); SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926); 68 CONG. REC. 4569-81 (1927); 67 CONG. REC. 10912-25 (1926); 66 CONG. REC. 2233-34 (1925); 66 CONG. REC. 998-99 (1924).

A careful reading of the legislative history convinces us that Congress simply did not think of the issue when it enacted the statute, even though the Supreme Court and the Eighth Circuit had approved tribal taxation of nonmembers under similar circumstances. *See* Part II, *supra.* There was dispute over whether the Indians should receive

all of the royalty income from leases of reservation lands. Legislators who opposed the Act as too generous might well have voted against giving the Indian tribes power to levy taxes, but the majority, who obviously thought that all benefits from the minerals on the reservations belonged to the Indians, might well have voted the other way. At no time when the state taxes were mentioned was there any discussion that the amount of such taxes might be relevant to passage of the Act. We therefore conclude that section 398c, being part of an act passed to benefit the Indians and ambiguous in letter and intent with respect to tribal taxation, does not preempt the tribal tax ordinance at issue in this case.[5]

It also may be argued that by virtue of its regulation of the leasing process, Congress preempted independent tribal taxation of those acquiring leases by that process. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (all-inclusive federal regulations and statutes applicable to trading on the reservations with Indians preempt state taxation of traders doing business thereunder). In essence, the argument is that by prescribing the procedures for the acquisition of leases and determining

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[5] The Tribe also argues that New Mexico has no power to levy its severance tax on production within the reservation. Its argument in essence is that the General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), which makes uniform the laws applicable to leasing of mineral rights on Indian reservations, and does not contain a specific grant of power to the states comparable to that found in the Act of March 3, 1927, ch. 299, § 3, 44 Stat. 1347 (codified at 25 U.S.C. § 398c), repealed the latter provision. See § 7, 52 Stat. 347. Because the State of New Mexico is not a party to this litigation and we hold the State's power to tax, if any, is not exclusive, we do not reach this question. For the same reasons we do not address the Tribe's contention that the trial court erred in not allowing the Tribe to put the leases into evidence to show whether they were granted under § 398c or under § 396a.

the royalty, bonus and rental payments the Indians are to receive, Congress intended that no burdens other than those embodied in the leases be imposed on the lessees.

When Congress first authorized leasing of land within executive order reservations for oil and gas purposes in the Act of March 3, 1927, ch. 299, § 1, 44 Stat. 1347 (codified at 25 U.S.C. § 398a), it provided that the same rules apply as for leasing oil and gas interests on other types of reservations. *See* 25 U.S.C. §§ 397, 398. Thus, the Secretary of the Interior, with the consent of the tribal council, was charged with the responsibility of conducting a public auction to obtain the best terms possible for the Indians. *See* 25 U.S.C. § 398. But in 1938 Congress effected a change in this scheme that is significant for our purposes. The General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), intended to make uniform the various laws applicable to the leasing of Indian lands for mining purposes and to conform the laws to the purposes of the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476,477. *See* H.R. REP. NO. 1872, 75th Cong., 3d Sess. (1938). Therefore, it elaborated on the procedures to be followed for leasing oil and gas interests. But of greater significance is the proviso found in that section, which allows tribes organized and incorporated under 25 U.S.C. §§ 476, 477 to assume and define for themselves the leasing process.[6]

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[6] 25 U.S.C. § 396b provides:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the

Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. § 476, determine the terms upon which they will lease their lands and regulate the operations of their lessees.[7] Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing

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lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 464-475, 476-478, and 479 of this title.* (Emphasis added).

[7] The Secretary of the Interior has implemented by regulation the substance of the proviso as follows:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. § 171.29 (1979).

its revenues. It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." City of St. Louis v. United Rys. Co., 210 U.S. 266, 280 (1908). *See also* New Orleans City & Lake R.R. v. City of New Orleans, 143 U.S. 192 (1892).

We have considered the remaining contentions of the parties and do not find them to be dispositive.

The judgment of the trial court is reversed and remanded with direction to enter judgment in favor of appellants.

Nos. 78-1154 and 78-1251

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

McKAY, Circuit Judge, concurring:

While I concur fully in the opinion of the court, I file this statement to emphasize certain considerations dictating the result reached.

As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were "the Indian Tribes."[1]

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. 1, § 8.

Beginning with the ratification of the Constitution, it is essential to examine both the actual dealings with the tribes and the language employed in those dealings in order to comprehend the tribes' special status. Even the conquering government characterized them as "nations." The early Supreme Court decisions incorporate those national concepts as, for instance, in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall wrote: "[A] weaker power does not surrender its independence — its right to self government, by associating with a stronger and taking its protection." *Id.* at 561. Both the language and formality of treaties were employed in defining the tribes' special status. Indeed, "[t]he Indian tribes were recognized as powers capable of making treaties before the United States was." F. Cohen, *Handbook of Federal Indian Law* 274 (1942).

The source of cession of Indian lands is of relatively little consequence. Whether the lands came from the exaggerated claims of dominion asserted by France, Spain, Russia or Mexico, our government continued to treat the Indian tribes with the same essential assumptions. For example, the President negotiated and the Senate ratified a treaty with the Mescalero Apaches — a nation of Indians living within the land ceded by Mexico — only four years after the Treaty of Guadalupe Hidalgo. *See* Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). In no sense, then, were all vestiges of governmental power abolished in the New Mexico tribes. Thus, we see that the Indians were never treated as mere corporations, mere landholders or mere associations. While it is true that Congress did not formally ratify the proposed treaty with the Jicarilla, that fact does not derogate from the general underlying assumptions about the tribe's historic status. A congressional failure to ratify a treaty does not convert a "nation" into a voluntary association. The

profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation." F. Cohen, *Handbook of Federal Indian Law* 299 (1942) (citing 34 Op. Att'y Gen. 181, 186-89 (1924)).

Tribes have characteristics of sovereignty not enjoyed by the kinds of proprietary and fraternal bodies which the Chief Judge asserts are most analogous to the tribes. If we were to deny the importance of sovereignty in our analysis, we would be ignoring the clear dictates of the Supreme Court. *See, e.g., Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973). Indeed, the Court has consistently held the tribes to have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58.

Indian "self-determination" is not in substance the same as that of any voluntary association. *Congress* has explicitly "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). And the principle of self-determination may be said to *require* protection of territoriality. *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 Harv. C.R.-C.L. L. Rev. 357, 390 & 390 n.154 (1978).

Even though *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), shies away from the prospect of non-Indians answering to Indian tribunals for *criminal* behavior, it nonetheless confirms that tribes enjoy sovereign powers not remotely granted to corporations, voluntary associa-

tions, and the like. *Id.* at 208. Those powers may be subject to divestiture by the superior federal power, but such divestiture is implied only if the powers are inconsistent with the tribes' status. *Id.* In a limited area, *Oliphant* found divestiture, but "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 508 (1979). Tribes clearly do have governmental authority over nonmembers in many instances. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 65. *See United States* v. *Mazurie,* 419 U.S. 544 (1975); *Williams* v. *Lee,* 358 U.S. 217 (1959).

The reservation tribes, including the Jicarilla, typically and with congressional approval have operated as governments. There can be no doubt that the federal government, because of the special authority granted it in dealing with the Indians, has the power either to confirm in them or to grant to them typical municipal powers whether they be police powers, regulatory powers or fiscal powers. It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes. Such taxes certainly do not offend the concerns expressed in *Oliphant* because historically and conceptually these taxes are associated with land, even though the impact may ultimately fall on individuals, Indian or non-Indian.

Finally, because the case is so often cited, I think it important to emphasize that *Puyallup Tribe, Inc.* v. *Depart-*

ment of Game, 433 U.S. 165 (1977), provides no authority whatsoever for the State of New Mexico to assert jurisdiction over Indian reservations. The Chief Judge correctly notes that the case upheld the right of the State of Washington to regulate the netting of steelheads by individual Puyallup Indians. However, unlike New Mexico, Washington had explicitly asserted Public Law 280 "civil and criminal jurisdiction within the [Puyallup] reservation for most purposes." *Id.* at 175, 175 n.14. In addition, in contrast to the Jicarilla reservation, the Puyallup reservation has ceased to exist for all practical purposes. The Puyallups have alienated all but 22 acres of their 18,000 acre reservation, and none of the remaining 22 acres abuts on the river in question. *Id.* at 174. Furthermore, although the Jicarilla Apaches have not done so, a tribe may voluntarily relinquish some of its jurisdictional rights. In *Puyallup Tribe,* the Court interpreted the relevant treaty as permitting state regulation. *Id.* at 175.

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AMOCO PRODUCTION COMPANY, et al. v.
JICARILLA APACHE TRIBE, et al.

SETH, Chief Judge, dissenting:

I must dissent from the majority opinion for several reasons.

I would begin the analysis of the issues presented in this appeal at a very early date to place the matter in its historical context. Thus, in my view, the consideration of this appeal should *not* start with an analysis of "sover-

eignty," as the Secretary urges, as this includes too many assumptions and generalizations which are questionable but which nevertheless influence the outcome. As so often happens when a start is made too far along the sequence of events or the development of doctrines the selection of a place to start determines where the writer is going to come out. Thus I would start instead with an examination of the fundamental relationships as they existed initially between the federal government and the Jicarilla Apaches, and this relationship as influenced by the creation of the State of New Mexico.

The Jicarilla Apaches were then and now are in the area ceded to the United States after the war with Mexico. The Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922) contained provisions for the recognition of land titles, and the proprietary interests of the citizens of Mexico within the area ceded. No separate mention is therein made of Indian lands or any recognition given to Indian groups other than border problems. These groups had been under the rule of Spain and of Mexico for two hundred years. They were in an area settled by Spain and Mexico and in frequent contact over the years. The Pueblo Indians had received grants of land as had non-Indian groups. The Treaty treats all persons within the ceded area in the same way. The Treaty of Guadalupe Hidalgo thus spoke for all persons within the geographical area concerned, as would any treaty. There was no separate treatment of particular areas or groups and there was no reason why there should have been. All persons had been subjects of the Spanish crown and the government of Mexico for several hundred years. The sovereignty was thus *transferred* from the government of Mexico to the United States. This was not an area being occupied by the first foreign sovereign to come on the scene wherein it would be expected

that the various groups of inhabitants would be dealt with separately or differently. Instead it was the conclusion of a war between two nations one of which, with its predecessor, had exercised complete authority and sovereignty over the land and all the people for several hundred years. With the end of the war and the peace treaty all the persons in the ceded area who stayed automatically came under the complete authority of the United States. They were thereby transferred from one sovereign to another. The citizenship issues have been treated by a number of authorities and need not be considered here because there is no question as to the complete authority of the new sovereign over all the people as a consequence of the Treaty with Mexico and the position as a successor.

At the end of the Spanish occupation there were in New Mexico and Arizona some six or eight independent Apache tribes. One of these was the Jicarilla Apaches. In 1846 after the period of Mexican sovereignty the Jicarillas numbered about 500 according to Governor Bent. There were then in all ten to twelve groups, each consisting of eight to ten family units, with a total of about forty-five individuals. Albert H. Schroeder, *Apache Indians I* (Garland Publishing Co. reprints, reports and exhibits) [hereinafter cited as Schroeder]. The basic unit was the family group. There were no clans or gentes, M. E. Opler, referring to the Jicarillas (as quoted by Schroeder), writes:

> "The Tribe was a rather nebulous entity of its members. The band was a man's immediate concern.
>
> . . . .
>
> "They were semi-nomads, following wild food harvests.
>
> . . . .
>
> "The people living in one section of the tribal range would seldom meet their tribesmen of a more distant quarter."

Opler also writes that the local groups would form a loose confederation for social purposes, and for defense or aggression. When the small units banded together for war a leader was accepted by agreement, but each individual was free to come or go at will or reject the leader (Schroeder). As early as 1796 Colonel Don Antonio Cordero, as to all Apaches, reported (per Schroeder): "At present they do not compose one nation of uniform customs, usages and tastes." There was, of course, no central authority for the Jicarillas at any time. Each autonomous group would winter around their geographic landmark near the Sangre de Cristo Mountains, and in summer move about with the availability of food, and move eastward to hunt buffalo. These groups used an area of some 5,000 to 7,000 square miles. *See generally* H.R. Rep. No. 2503 (1953). There was thus self-determination within the socio-religious-family relationships. This went with the small groups wherever they went as it had no geographical significance nor relationship to any other group. There were several small groups who farmed near Taos and Cimarron. For descriptive purposes the Spanish referred separately to the eastern groups, the Sand group, and the more western group. An eastern group leader was dealt with for a time in the pre-American period.

The Treaty of Guadalupe Hidalgo and the American occupation necessarily displaced all existing authority in the area, and there were then created the only governmental entities in New Mexico which were to exist during the interim period. Thus a new government came on the scene to supplant entirely the old. This was not an unfamiliar event in the history of the world.

Thus with the substitution of the government of the United States for the government of Mexico all the individuals in the area started anew with only their property.

Thus there is nothing to build on in New Mexico to create a concept of sovereign power in any group remaining from Spanish or Mexican times. The start is from a zero base with the American occupation for all persons in the area. This new structure was established by the code promulgated by General Kearney in September of 1846. It was a complete code of laws and created the framework of the government with many details. Thus there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy pueblos. The Jicarilla Apaches had no such powers over others, and if they had any they would have been lost by the American occupation.

The act organizing the territory of New Mexico was effective in September of 1850 (9 Stat. 446). This was a skeleton of organization and contained no mention of land ownership nor of the Indians. This was followed by the Enabling Act for the State of New Mexico (36 Stat. 557, Act of June 10, 1910). This Act contains the first reference to the Indians as a group. This Act recognized them only as landowners or possible landowners. The Act as to non-Indians provides in part that "people inhabiting said proposed state" disclaim all proprietary claims to the lands of the United States and of the Indians. The Act also acknowledges the exclusive jurisdiction in Congress over Indian lands. This disclaimer is by the "people" and only of *proprietary* interests. It has nothing to do with a disclaimer of sovereign power of the state, and again relates only to lands in an attempt to retain the status quo, and the rights under the Treaty of Guadalupe Hidalgo.

The Enabling Act, of course, contemplated the creation of a state under the United States Constitution with the vesting of broad powers in the new state. The Constitution

contemplates that the states are to create within their boundaries the counties, parishes, cities and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundation of governmental authority as it exists in the United States. Not only are there no federally created governmental entities within the states provided for by the Constitution, but it also does not contemplate the existence of other "nations" within the boundaries of the United States. Obviously there is no place for them in the governmental structure therein created.

It is significant in this respect that the Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, quoted from United States v. Kagama, 118 U.S. 375, the following:

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.' "

As to the Jicarillas, long after the American occupation legislation began to fill the vacuum as to their internal matters, their relation with the federal government and New Mexico, their money, and their tribal businesses, but all within Constitutional limitations. The place or location in New Mexico to be occupied by the Jicarillas after the American occupation changed several times. There were a series of executive orders promulgated and revoked. Fin-

ally, a location was established and the Executive Order recites that a described tract is "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." This is obviously something other than "ownership" but for our purposes it is no different from any other real estate "owned" by an individual or a group. It is no different from the Spanish and Mexican community land grants existing and recognized in New Mexico from the earliest times. These grants are also managed, used, and owned by groups in a community. The combination of land ownership and self-determination for anyone does not add up to anything more than the elements separately considered. The combination does not create a governmental agency or entity recognized or contemplated by the Constitutions of the United States or of New Mexico.

The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is as it should be for self-determination; however, such a group of tribal members excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided authority exists to govern. Here we cannot add the exclusive group self-determination to land ownership and come out, as to the outsiders, with anything more than the rights of a private landowner. "Self-determination" for such an exclusive group is in substance what any socio-religious group has in this country, and should have. If such group owns a tract of land, there is the same combination of self-determination and private property which again adds up to private property as to non-members. This is typical of community land grants in New Mexico.

The added element as to the Jicarillas is the control by Congress and the limited land "ownership." These for all practical purposes must be negative elements.

The plenary power of Congress over the Indians and their lands is obvious, but it must be recognized as a power "over the Indians" and not a power over non-Indians. The power of Congress over the Indians and their lands cannot include the exercise of such power to diminish the rights of non-Indians. To do so is to exercise plenary power over non-Indians. Thus Congress cannot under the Constitution add sufficient elements or powers to such an exclusive tribal group any more than it can to any other socio-religious group which would enable the members to exercise governmental powers of any nature in New Mexico.

The Secretary here urges that the Reorganization Act added some new ingredient of a governmental nature. Under the Constitution Congress cannot add new governmental entities in New Mexico not theretofore provided for. The federal government cannot by the Reorganization Act or by any other method introduce "nations" or governmental entities within the state. The Reorganization Act is an aspect of the current policy of the federal government seeking to cast self-determination machinery in a form in which it is accustomed to, and which has a "governmental" appearance. The whole concept of self-determination should be taking place and should have been advanced in years past. All must agree that it is most desirable, and to be valid it must be recognized for what it really is — "self-determination."

It is a mistake to generalize about "Indian rights," wherever the groups may be in the United States, and to disregard the events in their history, in the history of the states where they may now be located, and the events and sequence of such events in the history of the United States.

The differences are too great to permit the broad generalizations which are urged on this appeal by the Government or the basic assumptions made therein.

The State of New Mexico under specific federal statutes and under its sovereign powers has extensive jurisdiction within Indian reservations which it may choose to exercise or not to do so. The Supreme Court in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, considered and upheld the right of Washington State to control the netting of steelheads by individual Indians within the Puyallup Tribe's reservation. *See also* Kake Village v. Egan, 369 U. S. 60.

The Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, referred to the many instances where the Court has referred to the limited authority retained by Indian tribes. The Court therein refers to the "quasi-sovereign" reference in The Cherokee Nation v. Georgia, 5 Pet. 1, and then states:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'"* (Emphasis supplied.)

The Court also refers therein to Johnson v. M'Intosh, 8 Wheat. 543, and stated that:

> "We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States."

The Court continued:

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power

> to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*'" (Emphasis supplied.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, is a significant decision by the Supreme Court. It is, of course, directly concerned with the authority of an Indian tribe to exercise criminal authority over a nonmember. The decision, however, carries a parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all matters relating to nonmembers. We have above referred to portions of the opinion and the references to other Supreme Court opinions therein contained. The decision represents, together with United States v. Wheeler, 435 U.S. 313, a description of Indian "sovereignty" after all its restrictions and limitations are applied, as authority over members of the tribe. This is "self-determination" as it now exists. The Court in *Wheeler* said:

> "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.' *United States* v. *Kagama, supra,* at 381-382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16."

In a footnote to the above, the Court added:

> "Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee*

Intermarriage Cases, 203 U.S. 76; *Roff* v. *Burney,* 168 U.S. 218, 222-223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U.S. 382; *cf. United States* v. *Quiver,* 241 U.S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U.S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100."

The Court in *Wheeler* continued:

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

And again:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

And again:

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection.' "

These quotations are especially significant when we consider the history of the Jicarillas, and the zero base from which they started into the American occupation. Even in United States v. Mazurie, 419 U.S. 544, the Court referred to the tribe there concerned as possessing "a certain degree of independent authority over matters that affect the internal and social relations of tribal life."

The two principal cases considered — *Oliphant* and *Wheeler* —, of course, concerned criminal jurisdiction, but again the reasoning and analysis upon which the decisions are based is equally applicable to other "jurisdiction" or "powers" over nonmembers which would originate with any concepts of governmental status or an aspect of sovereignty. *See also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. These several recent decisions, in my view, are determinative of the issue on appeal.

Thus under the most recent cases "Indian sovereignty," if it may be generalized, means self-determination. It means the right of the Jicarillas to control their internal business-governmental affairs relating to tribal members and, of course, their social and religious affairs. This is added to the usual rights which accompany the ownership of property both real and personal. These rights taken together do not include the taxation power here sought to be exercised. In contrast to the many license cases cited by the parties, if there is a license it is the executed oil and gas lease. The tribe is as any other landowner in relation to the lease for the purposes under consideration.

I would thus affirm the trial court.

Nos. 78-1154 and 78-1251

MERRION, et al. v. JICARILLA APACHE TRIBE and ANDRUS, SECRETARY.

BARRETT, Circuit Judge, dissenting:

I.

In *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116, (10th Cir. 1979), we discussed the unique relationship between the United States Government and the Indian Tribes:

> Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. *Montoya* v. *United States,* 180 U.S. 261, 21 S.Ct. 358, 45 L.Ed. 521 (1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. *Native American Church* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).
>
> Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary au-

> thority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation* v. *County of Oneida, supra; United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).
>
> It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).
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> 601 F.2d at pp. 1125, 1126.

In the exercise of the elusive concept of "tribal sovereignty", the courts have been able to readily define the limits thereof only if a federal statute or treaty speaks directly to the subject, i.e., the power of an Indian tribe to exercise a particular jurisdiction. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *Bryan* v. *Itasca County, Minnesota,* 426 U.S. 373 (1976). Thus, any general federal law fails if it conflicts with or abrogates a tribal treaty right. *United States* v. *Winnebago Tribe of Nebraska,* 542 F.2d 1002 (8th Cir. 1976). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Tribes do, however, retain those aspects of "sovereignty" not withdrawn. *United States* v. *Wheeler,* 435 U.S. 313 (1978).

Indian treaties have not been interpreted narrowly, but have been construed so as to generously recognize the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma* v. *United States,* 390 U.S. 468 (1968). Accordingly, all doubtful expressions contained in treaties should be resolved in the Indians' favor, *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), although the Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. *Lone Wolf* v. *Hitchcock, supra.*

In the instant case there are no treaty rights involved, inasmuch as the Jicarilla Apache Tribe Reservation was carved out of the public domain and withdrawn by Executive order. A tribe occupying lands under a treaty has rights which are contractual in nature; however, a tribe occupying reservation lands by virtue of an Executive Order does so at the will of the Congress. Under either circumstance, i.e., creation of Indian reservations by treaty or Executive order, the exclusive plenary legislative authority of the Congress is superior *when exercised.* The "jurisdictional" problem relating to the applicable law of "Indian country" was discussed in *Washington* v. *Yakima Indian Nation,* 439 U.S. 463 (1979).

> Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia,* 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 219-220.7. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish &*

> *Kootenai Tribes,* 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n.,* 411 U.S. 164, 170-171.
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> 439 U.S. at pp. 470, 471.

The Congress, of course, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of Indian tribes. *United States* v. *Wheeler, supra.* This power was articulated in *United States* v. *Mazurie,* 419 U.S. 544 (1975).

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-322 (1936). Thus it is an important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations. . .," *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n.,* 411 U.S. 164, 173 (1973).
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> . . . [*W*]*hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.* [Emphasis supplied].
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> 419 U.S. at pp. 556, 557.

The Supreme Court has recognized that Indian Tribes have separate, distinct rights of self determination con-

stituting them "quasi-sovereign tribal entities." *United States* v. *Wheeler, supra; Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). These rights flow from the historical recognition of tribal political independence in the context of tribal-federal relations first declared in *Worcester* v. *Georgia, supra,* which involved the applicability of certain statutes enacted by the State of Georgia relative to reservation lands of the Cherokee Tribe. The Court held that the State statutes were not enforceable. While recognizing that Indian tribes are independent political communities possessing attributes of sovereignty over both their members and their territory, the Court nevertheless placed particular significance on the fact that the Constitution vested full control of Indian affairs in the Federal Government. In my view, the exclusivity of "control" indicated in *Worcester, supra,* was modified at least interpretive-wise, by subsequent Supreme Court decisions which recognized the power of the states in specific areas over Indians and reservation lands providing that the power exercised does not infringe on the tribal powers of self-government which are part of the doctrine of tribal sovereignty, and, thus, those "inherent powers of a limited sovereignty" referred to in *United States* v. *Wheeler, supra.*

Applying the foregoing test, I conclude that it is incumbent upon the courts, on a case-to-case basis, to carefully scrutinize the power to be exercised in terms of the intended purpose and the interest to be served. Neither treaties or statutes dealing with Indian affairs relate or "speak" to many of the "jurisdictional" conflicts which have surfaced.

If statutes and treaties provide clear guidance relative to Congressional intent, no further inquiry is required. Thus, in the very area of our inquiry here (the power of the Indian Tribes to tax non-members on the Reservation lands) there are decisions upholding tribal tax assessments

authorized by treaties, statutes or agreements with the United States. In *Morris* v. *Hitchcock,* 194 U.S. 384 (1904), the Supreme Court upheld an act of the Chickasaw Nation imposing an annual per head privilege or permit tax on cattle and other animals owned by a non-Indian who was grazing animals under a lease on the Reservation lands. The Court specifically found the tax assessment to be authorized under both the terms of treaties entered into with the Five Civilized Tribes, and the Curtis Act. In *Buster* v. *Wright,* 135 F. 947 (8th Cir. 1905) the Court upheld a "permit tax" imposed by the Creek Indian Nation in the nature of a percentile levy on all goods offered for sale by non-member traders doing business on the Reservation lands. The Court relied upon *Morris* v. *Hitchcock, supra,* and *Crabtree* v. *Madden,* 54 F. 426 (8th Cir. 1893) in upholding the tax, i.e., the existence of the power and authority granted the Tribe under treaties and acts. Even so, the court did opine that in the absence of an Act of Congress, treaty or agreement with the United States, the Creek Nation would be empowered to impose the tax as ". . . one of the inherent and essential attributes of its original sovereignty." In *Crabtree* v. *Madden, supra,* the Court upheld an annual license tax of $200.00 assessed by the Creek Nation against non-member traders doing business on the Reservation based upon the power and authority reserved to the Tribe under the Treaty of August 7, 1856, 11 Stat., p. 703, Art. 15, which granted the Creeks the unrestricted right of self-government with full jurisdiction over persons and property within their limits. The Treaty provided that all persons not members of the Tribe were to be regarded as "intruders" subject to removal unless traveling through or "trading therein under license".

If, then, there are no treaties, statutes and agreements granting such power, the courts have been compelled to engage in the "balancing of interests" process. In this

circumstance, the Supreme Court has recognized that non-Indians and their property interests within Indian reservations are subject to licensing enactments or ordinances. *United States* v. *Mazurie, supra,* involved the inherent power of the Tribe to grant or deny a liquor license to a non-Indian liquor dealer operating a retail business on non-Indian lands within the boundaries of the reservation. In like manner, tribal hunting and fishing licenses governing non-members who enter the reservations to hunt and fish have been grounded upon the inherent powers of the Tribe. *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976).

There are other areas where courts have been compelled to engage in the balancing of interest process. Thus, in *Puyallup Tribe, Inc.* v. *Washington Game Department,* 433 U.S. 165 (1977), the State of Washington's conservation regulations dealing with an allocation of the total number of steelhead fish which could be netted by the Indians on the waters flowing through reservation lands was upheld as a proper conservation measure and not as an attempt to allocate the number of fish which could be netted by the tribe. To the same effect is *Organized Village of Kake* v. *Egan, supra.* The Court there upheld the State of Alaska's prohibition against the Thlinget Indians' use of salmon traps on waters flowing through the incorporated communities, notwithstanding Alaska's disclaimer in its Alaska Statehood Act relating to Indians, to-wit: (a) disclaimer of right and title to Indian property, and (b) recognition that the United States retains "absolute jurisdiction and control" over right and title of Indian property. *Enriquez* v. *Superior Court,* 565 P.2d 522 (Ariz. Ct. App. 1977) held that a tribal court had jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the reservation.

The Supreme Court has dealt with the "balancing of interests" problem in very few decisions. In *Oliphant* v. *Suquamish Indian Tribe, supra,* the Court held that Indian tribes lack criminal jurisdiction over non-members in the absence of specific Congressional authorization. The Court observed, *interalia:*

> Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority . ." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished." *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574 (1823).
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> 435 U.S. at pp. 208, 209.

The Supreme Court, in *Organized Village of Kake* v. *Egan, supra,* following a review of a number of its prior decisions in this area of concern, observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
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> 369 U.S. at p. 75.

The problems generated by the issue of the "exclusiveness" of federal jurisdiction were highlighted by this language contained in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973).

> . . . The upshot [of more individuality in treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken to-

> gether, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake, supra* at 75; *Williams* v. *Lee,* 358 U.S. 217 (1959); *New York, ex. rel. Ray* v. *Martin,* 326 U.S. 496, 499 (1946); *Draper* v. *United States,* 164 U.S. 240 (1896).
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> 411 U.S. at p. 148.
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> *See also: United States* v. *Mazurie, supra.*

I would hold that the District Court did not err in finding that the Tribe's sovereign status does not extend to or allow the imposition of the challenged Tribal Severance Tax. In my view, the power of the Tribe to impose such a tax in these consolidated cases is clearly a political question which has not been explicitly addressed by the Congress. If the Congress intends that such power exists, it is incumbent that legislation be enacted explicitly so declaring. Until or unless the Congress affirmatively acts, I would hold that Tribe does not possess the right, power and authority to enforce the collection of its Tribal Severance Tax. My research discloses only two opinions which recognize the *inherent power* of an Indian tribe to enact and enforce a tribal ordinance assessing a tax upon a non-Indian's income from business conducted within reservation boundaries. *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). I decline to adopt the broad interpretation of inherent tribal sovereignty—power laid down in these opinions, and adopted by the majority here.

A significant aspect of the issue before us here involves recognition that the United States Government, as guar-

dian, has enacted much legislation and appropriated significant amounts of federal funds for the direct, specific and exclusive benefit of its Indian wards. In like manner, the various states wherein the tribes reside have rendered state governmental aid and assistance in many important areas, utmost of which is perhaps the maintenance of the public schools. To what extent the Congress intends its beneficial enactments and appropriations to serve as exclusive means, I do not know. It is, however, my view that this involves a legislative judgment in the nature of a political question. The question of what involves "essential tribal relations" referred to in *Williams* v. *Lee, supra,* is, in my judgment a political question.

In positing the "inherent sovereignty" issues presented here as a political question for Congressional determination, we recognize that the United States Government, out of avowed solicitude for the welfare of its Indian wards who were considered ". . . . a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith," *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912), undertook by treaties, statutes and executive orders to establish legal relations between the United States Government and the Indian Tribes which ". . . resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). Implicit in the relationship thus created, in terms of "ownership" of the property set aside for the use, occupancy and benefit of the Indian tribes, is the fact that legal title, with its attendant aspect of dominion and ultimate control, vests in the United States, as guardian, with the right of use, benefit and occupancy vesting in the Indian wards. That relationship between the United States Government and the various Indian tribes, however, was never intended to be one of Indian servitude. Thus, the Supreme Court has held that

the power of Congress over Indian affairs, though plenary in nature, is not absolute and that the standard of review recently applied is that legislative judgments should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 85 (1977); *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974).

The "Indian Sovereignty" doctrine cannot be equated with governmental sovereignty of the United States Government. It is, however, of a "unique and limited character" existing at the sufferance of Congress and subject to complete defeasance. *United States* v. *Wheeler, supra,* at p. 323. Tribal self government is rooted in the current federal policy of promoting tribal self-government, *Bryan* v. *Itasca County, Minnesota, supra,* which advances the social, institutional, political and cultural values peculiar to the respective tribes. The basic right of Indian internal self-government is directed to their right "of regulating their internal and social relations," out of recognition of their "semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *United States* v. *Kagama,* 118 U.S. 375, 381 (1886).

II.

In the context of the above analysis of the current federal policy, I now consider the status of Congressional judgment in the area of the challenged Tribal Severance Tax in weighing the preemption contention against the claim of inherent tribal sovereignty. If the Congress has explicitly addressed the subject matter, obviously there is no need for this Court to engage in the "balancing of interests" determination.

In my view, just as found by the District Court, there is clear congressional intent controlling in this case. I would hold that the enactment by the Congress on March 3, 1927, of 25 U.S.C.A. § 398c., 44 Stat. 1347, constituted clear, unambiguous legislative intent that only a "state or local authority" is empowered to levy and collect taxes upon the production from oil and gas wells produced and saved *"upon lands within Executive order Indian reservations."* That statute imposes one restriction only, i.e., that such taxes may not become a lien against Indian lands or property. The statute reads in full as follows:

> § 398c. Same; taxes
>
> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Tribe and the Secretary of the Interior contend that 25 U.S.C.'s § 398c. does not pertain or control. They argue, first, that Tribe, as an element of its sovereign status, is empowered to enact and enforce its severance tax ordinance and, second, that the Congressional enactment on May 11, 1938, of 25 U.S.C.A. § 396a. specifically governs the subject leases (and production therefrom) and does not permit state taxation of oil and gas produced within the Tribe's reservation. That statute reads as follows:

§ 396a. Leases of unalloted lands for mining purposes; duration of leases.

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198 § 1, 52 Stat. 347.

I cannot accept the contentions of Tribe and the Secretary, with full recognition of the rule that limitations on tribal self-government cannot be implied from a statute or treaty but must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history. *Bryan* v. *Itasca County, Minnesota, supra; Morton* v. *Mancari, supra.* My review of the legislative history of 25 U.S.C.A. 398(c) convinces me that the Congress did intend to grant States and local authorities the *exclusive* authority to tax non-Indian oil and gas lessees on production realized from their oil and gas operations conducted on Executive order Indian reservation lands. It has been held that Indian tribes are not "states". *Native American Church* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe, supra.* The Congressional discussions and debates relating to this legislation concentrated on the fact that Executive order reservation lands were not in the same category as those lands set aside under treaty to a tribe which "gave up" or "surrendered" ancestral or aboriginal rights in exchange therefor, but were, instead, simply set aside as a "gratuity" to the tribes from the United States. In the sense of the "balanc-

ing of interests" process, the Congress compromised the competing interests of the States and the tribes by authorizing the tribes to retain all of the royalties paid under the operating leases and the States to impose taxes on the production of oil and gas. (H. Rept. No. 1791, 69th Cong., 2nd Sess., 69 Cong. Rec. 4580 (1927)). *See also:* (S.B. 876, 68th Cong., 2nd Sess., 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2234 (1925); 67 Cong. Rec. 10915 (1926).

I would reject Appellants' argument that the 1938 enactment of the Indian Mineral Leasing Act, 25 U.S.C.A. § 396(a), *et. seq.*, repeals 25 U.S.C.A. 398(c). Although cognizant that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and that doubtful expressions are to be resolved in favor of the Indians, *Morton* v. *Mancari, supra,* I would hold that because nothing in the Mineral Leasing Act of 1938 speaks to the subject of taxation of oil and gas produced from Indian lands and certainly nothing relating to Executive order reservation lands, there is lacking that required "clear intention" of provisions contained in a general statute necessary to effect repeal of or nullify the express terms of a specific statute, (25 U.S.C.A., 398c.), regardless of the priority of enactment. *Morton* v. *Mancari, supra; Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800 (1976); *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973); *Jicarilla Apache Tribe* v. *United States, supra; Glover Construction Company* v. *Andrus,* 591 F.2d 554 (10th Cir. 1979); Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05. Statutes must be construed as intended by the drafters when enacted in the light of conditions as they existed. *United States* v. *Stewart,* 311 U.S. 60 (1940).

In addition to reliance on repeal by implication of 25 U.S.C.A. § 398c. by enactment of 25 U.S.C.A. § 396(a),

et seq., Tribe further relies on the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. §§ 476-477.

In accordance with the Indian Reorganization Act, Tribe adopted a revised Constitution on December 23, 1968, subsequently approved by the Undersecretary of the Interior. The revised Constitution organized the tribal government into the tripartite departments of legislative, executive and judicial. The principal governing body is the tribal council consisting of elected members of the Tribe. Pertinent portions of the Tribe's revised Constitution are:

Article XI, Section 1 provides:

> The *inherent powers* of the Jicarilla Apache Tribe, *including* those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. [Emphasis supplied].

Subparagraph (e) of Section 1, Article 10, provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

Section 2 of Article 10 establishes the procedures for approval of tribal ordinances, which, in substance, provides that ordinances enacted be presented to the Superintendent, Bureau of Indian Affairs, Jicarilla Apache Agency, within ten days after approval by the Council, and that the Superintendent shall within ten days following receipt by him, transmit it to the Secretary of the Interior with his recom-

mendation. The enactment becomes effective when approved by the Secretary, or if he does not act within 120 days following submittal to him. It was under authority thereof that the tribal council of Tribe on July 9, 1976, enacted its Oil and Gas Severance Tax Ordinance and further enacted a Severance Tax Permanent Fund Ordinance. These ordinances were subsequently approved by the Secretary of the Interior's delegate. The Tribal Severance Tax is expressly imposed on "any oil and natural gas severed, saved and removed from Tribal lands". The *measure* of the tax is 5 cents per million BTU of gas and 29 cents per barrel of crude oil or condensate produced on the Reservation and *"sold or transported off the reservation"*. All oil, gas or condensate representing [reserved] royalty gas "taken by the Tribe in kind and used by the Tribe", *is exempt from the Tax.*

Tribe does not — and cannot — point to any specific language in the Indian Reorganization Act of 1934 authorizing or empowering it to tax. In lieu of any such specific, clear language, Tribe relies upon (a) the stated purpose of the Act, i.e., freedom to organize for purposes of self-government and economic enterprise, and (b) an opinion rendered by the Solicitor to the Secretary of the Interior in 1934, identified as 55 I.D. 14, setting forth the purported intentions of Congress in enacting Section 16 of the Act. The opinion reads in part as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.
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> . . .
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> I conclude that under Section 16 of the Wheeler-Howard Act (Public No. 383, 73rd Congress) the

> "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the folowing:
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> . . .
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> 5. To levy dues, fees, or taxes upon the members of the tribe and upon non-members residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

Tribe contends that the Solicitor's opinion, rendered the same year the Act became effective, is the "best indication of Congressional intent available", citing to *Squire* v. *Capoeman,* 351 U.S. 1 (1956). [Brief of Tribe, In Chief, p. 24]. A careful examination of the exact language employed by the court in *Squire* v. *Capoeman, supra,* is simply that "These relatively contemporaneous official and unofficial writings are entitled to consideration." 351 U.S. at p. 9. I have considered them and find them wanting.

The only express language contained in the 1934 Act vesting rights and powers in a tribe or its tribal council, if organized under the terms of the Act is: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.* 25 U.S.C.A. § 476. The only conceivable language expressed in the § 476, *supra,* which the Solicitor's Opinion 55 I.D. 14 could have relied upon to "make the case" is that authorizing the various Indian tribes to organize under the Act "for its common welfare" and to adopt "an appropriate constitution and bylaws". Any reliance thereon, as support of Tribe's con-

tention that the Act effectively repealed 25 U.S.C. § 398c., *supra,* is misplaced.

My interpretation of the interplay between these conflicting contentions is, I believe, in accord with a detailed analysis of a similar conflict set forth in *Fort Mojave Tribe* v. *San Bernardino County,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1976). In that case, California exercised civil and criminal jurisdiction over Indian country within its borders [but specifically exempted taxation of any real or personal property belonging to any Indian or Indian tribe] authorized under 28 U.S.C. § 1360(b). The court pertinently observed:

> While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect the legal incidence of the tax clearly falls on the lessee.[3] The lessor will never be personally liable for any delinquent taxes arising under this taxing statute. . . Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset."
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> Our conclusion is buttressed by the Supreme Court's decision in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). There the Court, relying on the statement that section 476 of the Act [The Indian Reorganization Act of 1934] was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong.Rec. 11732, found that traditional tax immuni-

ties had neither been expanded nor reduced by the Act. *Mescalero, supra* at 153-54 n.9, 93 S.Ct. 1267. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundaries of their reservation. *We follow that lead here and refuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat.*

• • •

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. *Bryan* v. *Itasca County, supra,* forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although *McClanahan, supra,* held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan, supra* at 411 U.S. 168, 93 S.Ct. at 1260. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. *McClanahan, supra* at 179, 93 S.Ct. 1257. Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. . . *To permit such non-Indians to enjoy the immunity designed for*

Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. [Footnote omitted]. [Emphasis supplied].

543 F.2d at pp. 1256, 1257.

I observe that in the case at bar a holding that the New Mexico State taxes levied against the proceeds of oil and gas produced by lessee Operators from Tribe's Reservation lands are valid based upon the express Congressional "signal" authorizing same, i.e., 25 U.S.C. § 398(c), avoids any risk of permitting its imposition absent such clear Congressional consent. The Congress has expressly provided that the taxing laws of the various states extend over and apply to proceeds realized by non-Indian Operators from mineral exploration conducted on Executive Order Reservation lands. It is this power the court recognized in *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965).

In its Reply Brief and Additional Brief filed prior to oral argument, Tribe relies upon the Natural Gas Act of 1978, 15 U.S.C. §§ 3301, *et seq.,* as express Congressional recognition of tribal authority to impose severance taxes on natural gas. 15 U.S.C. § 3320(c) defines, for purposes of the Act, "State Severance Tax" as any "severance production, or similar tax . . . imposed on the production of natural gas . . . by any State or Indian Tribe." Tribe acknowledges that the conference report statement clearly shows that the Congressional conferees did not intend thereby to prejudge the outcome of cases then on appeal to this Court respecting the power of Indian tribes to impose taxes on non-Indians engaged in business activities on Indian reservations. In any event, I would hold that nothing in the language of the Natural Gas Act of 1978 can be interpreted as a Congressional grant of power to Indian

tribes to enact and levy tribal severance taxes. The language is not, either expressly or impliedly, an affirmative grant of such power of taxation to Indian tribes.

III.

I would hold that the District Court did not err in concluding that the Tribe's Severance Tax levied only against oil, gas or condensate produced on the Reservation and sold or transported off the Reservation is an unlawful multiple burden on and discriminatory against interstate commerce.

Tribe and Secretary contend that the severance tax ordinance is not in conflict with the commerce clause because the precise "triggering" event here is entirely "local" in nature, i.e., the tax is imposed on oil and gas when severed, saved and removed from tribal lands. From thence, it is contended that the eventual entry of oil and gas taxed locally upon severance from tribal property into interstate commerce outside of New Mexico does not thereby invalidate the tax. Thus, Tribe and Secretary, in effect, contend that the Tribe's tax is "insulated" by reason of the local nature of its application.

The record reflects that all of the gas provided by Appellee Marathon from Tribe reservation lands is sold in interstate commerce. [R., Vol. VI, p. 240]. Some sixty percent of the production realized by Appellee Amoco is sold in interstate commerce. [R., Vol. VI, p. 229]. Thus, inasmuch as the tax is not designed to apply until the oil and gas produced is "sold or transported off the reservation", I would hold that the incidence bears directly and discriminately against interstate commerce. *Northwestern States Portland Cement Co.* v. *State of Minnesota,* 358 U.S. 450 (1959); *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1939); *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938). A tax imposed on local activity related to inter-

state commerce is valid only if the local activity is not such an integral part of interstate process, the flow of commerce, that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954). There a Texas tax on the occupation of "gathering gas", measured by the entire volume of gas "taken", as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, was held invalid under the Commerce Clause. The Commerce Clause is offended when, as here, the tax, by its very nature, makes interstate commerce bear more than its fair share. *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948).

The Supreme Court has consistently struck down state laws which discriminately benefit [or may discriminately benefit] local or intrastate commerce at the expense of out-of-state or interstate commerce. In *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978) the Court held that the Commerce Clause protects the interstate market, and not particular firms from prohibitive regulations. Under this rationale, the Court observed that a state law does not discriminate against interstate commerce if it leaves the in-state and out-of-state businesses participating in the market on an equal competitive footing. In relation to the instant case, those businesses engaged in exclusive *intra-state* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving in *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing.

In *Boston Stock Exchange* v. *State Tax Comm'n.*, 429 U.S. 318 (1977), the Supreme Court stated:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g., Freeman* v. *Hewit, supra,* at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.,* at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963); *Nippert* v. *Richmond,* 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U.S. 113 (1908); *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U.S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951).
>
> 429 U.S. at p. 329.

I would affirm the District Court.

APPENDIX B

Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing, entered April 25, 1980.

MARCH TERM — April 25, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges

No. 78-1154

J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company and Gulf Oil Corporation,

Plaintiffs-Appellees,

vs.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Cecil Andrus, Secretary of the Interior,

Defendants-Appellants,

Mobil Oil Corporation and Oxy Petroleum, Inc.,

Intervenors-Appellees.

No. 78-1251

Amoco Production Company and Marathon Oil Company,

Plaintiffs-Appellees,

vs.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cases.

Upon consideration whereof, it is ordered:

1. Page 6 of the opinion filed February 22, 1980, is recalled and vacated, and a substitute page 6 is published and inserted in its place.

2. The petition for rehearing is denied. Chief Judge Seth and Circuit Judge Barrett voted to grant rehearing. Circuit Judge Seymour, who was not a member of the Court at the time of submission, did not participate.

3. Jicarilla Apache Tribe is granted leave to file its verified bill of costs out of time. The Court has considered the objection to the bill of costs filed by appellees. The Clerk shall issue a statement of costs in favor of appellant Jicarilla Apache Tribe in the sum of $993.51.

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: Nos. 78-1154 and 78-1251, Merrior, et al, v. Jicarilla Apache Tribe, et al

Enclosed is a new page 6 to be substituted for page 6 in the original opinion, which was filed February 22, 1980.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP/dvc

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. § 702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

APPENDIX C

Findings of Fact and Conclusion of Law of the United States District Court for the District of New Mexico, entered December 29, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Defendants,

AND

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,
Intervenors.

AND

CONSOLIDATED CASES

No. 77-343 Civil

AMOCO PRODUCTION COMPANY, A CORPORATION, AND MARATHON OIL COMPANY, A CORPORATION,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR, TONY MARTINEZ, EXECUTIVE DIRECTOR, NEW MEXICO OIL AND GAS ACCOUNTING COMMISSION,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, are residents of the State of New Mexico.

2. Jerome T. McHugh is a resident of the State of New Mexico.

3. Chase Oil Company is a New Mexico Corporation with its principal place of business in New Mexico.

4. Dugan Production Corporation is a New Mexico Corporation with its principal place of business in New Mexico.

5. Consolidated Oil and Gas, Inc., is a Colorado corporation with its principal place of business in Colorado.

6. Southland Royalty Company, formerly Aztec Oil and Gas, is a Delaware Corporation with its principal place of business in the State of Texas.

7. Tesoro Petroleum Corporation is a Delaware Corporation with its principal place of business in the State of Texas.

8. Amerada Hess is a Delaware Corporation with its principal place of business in the State of New York.

9. Supron Energy Corporation, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. Energy Reserves Group, Inc., is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. Huber Corporation is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. Continental Oil Company is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. Atlantic Richfield Company is a Pennsylvania Corporation located within the State of California.

14. Phillips Petroleum Company is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. Tenneco Oil Company is a Delaware Corporation with its principal place of business located within the State of Texas.

16. Getty Oil Company is a Delaware Corporation with its principal place of business located in California.

17. Gulf Oil Corporation is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Mobil Oil Corporation is a Delaware Corporation with its principal place of business in the State of New York.

19. Oxy Petroleum, Inc., is a California Corporation, with its principal place of business in the State of California.

20. Amoco is a Delaware corporation with its principal place of business in Illinois.

21. Marathon is an Ohio corporation with its principal place of business in Ohio.

22. The Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §§ 476-477, residing on an Executive Order Indian Reservation within the boundaries of the State of New Mexico. The Jicarilla Apache Tribal Council exercises the legislative powers of the Jicarilla Apache Tribe. Gwendolyn Velarde is the Treasurer of the Jicarilla Apache Tribe and is responsible for the enforce-

ment and collection of the Jicarilla Oil and Gas Severance Tax. Cecil Andrus is Secretary of the Interior.

23. The plaintiffs hold leases, granted by the Secretary of the Interior with the consent of the Tribe, for the recovery of oil and gas on the Jicarilla Apache Indian Reservation. Plaintiffs are at present producing oil and gas products on the reservation and paying royalties to the Tribe. Approximately 80% of the products are shipped interstate for sale outside the State of New Mexico.

24. The State of New Mexico imposes and collects from the plaintiffs the following taxes measured by the production on the Jicarilla Apache Reservation:

Oil and gas emergency school tax;

Oil and gas conservation tax;

Oil and gas production equipment ad valorem tax; and

Oil and gas severance tax.

25. The Jicarilla Apache Tribe on November 22, 1968, adopted a revised constitution which included a provision authorizing the Tribal Council to enact ordinances providing for the levy and collection of taxes and fees on nonmembers of the Tribe doing business on the reservation. The revised constitution, as amended, was approved by the acting Undersecretary of the Interior on or about February 13, 1969.

26. On or about July 9, 1976, the Jicarilla Apache Tribal Council adopted the Jicarilla Oil and Gas Severance Tax in No. 77-0-02 and thereafter such ordinance was amended by Tribal Council Ordinance No. 77-0-195 and resolution 77-327.

27. That in enacting 25 U.S.C. § 398(c) Congress intended to allow the states and local authorities the exclu-

sive right to tax oil and gas production from executive order Indian reservations.

28. That in enacting 25 U.S.C. § 398(c) Congress did not intend to include Indian tribes within the meaning of "state or local authority."

29. The Jicarilla Oil and Gas Severance Tax by its terms and the instructions for its implementation applies only to oil and gas produced on the Jicarilla Apache Reservation and not to similarly situated oil and gas produced in the same geological region of northwest New Mexico.

30. The Jicarilla Oil and Gas Severance Tax expressly provides for an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the tribe."

31. The Jicarilla Apache Tribal Oil and Gas Severance Tax as well as the written instructions directed to plaintiffs with regard to the payment of the tax, expressly provides that the tax need only be paid on gas, crude oil or condensate produced on the Jicarilla Apache Reservation "and sold or transported off the Reservation."

32. The Jicarilla Oil and Gas Severance Tax would, if valid, amount to over two million dollars annually.

33. That the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla Gas Severance Tax, if valid, onto their customers.

34. That if the plaintiffs are required to absorb the Jicarilla Oil Severance Tax such tax will substantially limit the ability of some of the plaintiffs to profitably operate some of the existing oil wells on the Jicarilla Apache Reservation.

35. If the wells operated by plaintiffs cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe.

36. That if the Jicarilla Apache Oil and Gas Severance Tax were valid the combined tax burden amounts to more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

37. That unless the Jicarilla Apache Tribal Severance Tax contained in Tribal Council Ordinance No. 77-0-02, as amended by Tribal Ordinance No. 77-0-195 and resolution 77-327, is declared invalid and the defendants restrained from taking action they will move to enforce such Ordinances and resolutions and collect the Jicarilla Apache Tribal Oil and Gas Severance Tax.

38. The Jicarilla Apache Tribe Severance Tax became effective April 1, 1977. Under the terms of the ordinance, plaintiffs would be subject to the severance tax by virtue of their production of natural gas and condensate on the Jicarilla Apache Reservation. Enforcement of the tax has been stayed pending a resolution of the legality of the tax.

39. That plaintiffs sell the gas and oil produced from the Jicarilla Apache Reservation in both interstate and intrastate commerce.

40. Prior to their incorporation under the Indian Reorganization Act in 1937 the Jicarilla Apache Tribe had never attempted to exercise a power of taxation over non-Indians.

41. That in adopting the Indian Reorganization Act 25 U.S.C. § 464 *et seq.* Congress intended Indian tribes accepting a charter thereunder to have only those powers specifically enumerated in the Act together with such

powers as were "vested in any Indian tribe or tribal council by existing law." The power to tax non-Indians is not one of the enumerated powers given to Indian Tribes incorporating under 25 U.S.C. § 464 and was not vested in the Jicarilla Apache Tribe by existing law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action.

2. That venue is proper in the United States District Court for the District of New Mexico.

3. That by enacting 25 U.S.C. § 398(c) Congress granted the state and local authorities the exclusive right to impose a severance tax upon oil and gas produced from executive order Indian reservations.

4. That the Jicarilla Apache Tribe is not a "state or local authority" within the meaning of 25 U.S.C. § 398(c).

5. The Jicarilla Apache Tribe Oil and Gas Severance Tax constitutes an unlawful multiple burden on interstate commerce.

6. The Jicarilla Apache Tribe Oil and Gas Severance Tax is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation and therefor discriminates against interstate commerce.

7. Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation.

8. That, as of the effective date of 25 U.S.C. § 464, et seq., the power to tax non-Indians was not vested in the

Jicarilla Apache Tribe or its Tribal Council, and not being one of the powers enumerated in the Act, the Secretary of the Interior's approval of the Tribal Constitution cannot operate to vest such power in the Tribe.

9. An actual justiciable controversy exists between the plaintiffs and defendants under the meaning of the Declaratory Judgment Act, 25 U.S.C. 2201 *et seq.* and pursuant to that act this Court declares the Jicarilla Oil and Gas Severance Tax to be illegal, unconstitutional, invalid and void and in conjunction with this Declaratory Judgment issues a permanent injunction restraining defendants from taking any action to collect the Jicarilla Apache Oil and Gas Severance Tax.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

H. VEARLE PAYNE
UNITED STATES DISTRICT JUDGE

APPENDIX D

Judgment of the United States District Court for the District of New Mexico, entered December 29, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Defendants.

AND

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,
Intervenors.

AND

CONSOLIDATED CASES

No. 77-343 Civil

AMOCO PRODUCTION COMPANY, A CORPORATION, AND MARATHON OIL COMPANY, A CORPORATION,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR, TONY MARTINEZ, EXECUTIVE DIRECTOR, NEW MEXICO OIL AND GAS ACCOUNTING COMMISSION,
Defendants.

JUDGMENT

THIS MATTER having been heard by the Court and the Court having studied the briefs submitted by the parties, heard the testimony, evidence and arguments of counsel and having entered its Findings of Fact and Conclusions of Law and being otherwise fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid and void, it is therefore,

ORDERED that a Permanent Injunction is herewith issued and that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with defendants be, and they hereby are restrained and enjoined from taking any action to enforce or collect the Jicarilla Apache Oil and Gas Severance Tax.

IT IS FURTHER ORDERED that the plaintiffs and intervenors recover their costs to be taxed by the Clerk of the Court.

H. Vearle Payne
UNITED STATES DISTRICT JUDGE

APPENDIX E

Constitution of the United States:

(1) Article I, Section 1
(2) Article II, Section 1
(3) Article III, Section 1
(4) Article IV, Sections 1, 3 and 4
(5) Article V
(6) Article VI, Sections 2 and 3
(7) Article VII
(8) Tenth Amendment

E. CONSTITUTION OF THE UNITED STATES

(1) Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

(2) Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and, if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

(3) Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

(5) Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Con-

stitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

(6) Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

(7) Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

(8) AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(9) AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(10) AMENDMENT XIV.

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Statutes:

(1) Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, 25 U.S.C. Sec. 461, et seq.

(2) Act of March 3, 1871, Chapter 120, Sec. 1, 16 Stat. 566, 25 U.S.C., Sec. 71.

F (1)

Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, 25 U.S.C. Sec. 461 et seq.

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to re-

store to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further,* That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent,

according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,* That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or

Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided, further,* That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order

of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided,* That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter

have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided,* That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall

continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands,

interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and aproval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of

any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

F (2)

Act of March 3, 1871, Chapter 120, Sec. 1., 16 Stat. 566, 25 U.S.C. Sec. 71.

Future treaties with Indian tribes.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired. (R.S. Sec. 2079)

APPENDIX G

Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922.

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO

(Treaty of Guadalupe Hidalgo — 9 Stat. 922)

(Ratifications exchanged at Queretaro, May 30, 1848)

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries — that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic.

Article I.

There shall be firm and universal peace between the United States of America and the Mexican republic, and

between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the General-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be reestablished, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence, at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican republic, to points that shall be selected by common agreement, at a distance from the seaports not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in their new positions, and for promoting

a good understanding between them and the inhabitants. In like manner orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange or ratifications of the present treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within the Mexican republic, as about to be established by the following article, shall be definitively restored to the said republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall

remain there at the time when this treaty shall be duly ratified by the government of the Mexican republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner, if possible: the Mexican government hereby engaging, as in the foregoing article, to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports on the Gulf of Mexico, in such case a friendly arrangement shall be entered into between the General-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the ex-

change of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the *Rio* Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York*, in 1847, *by J. Disturnell.*"

Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except, by the express and free consent of both nations, lawfully given by the

general government of each, in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceding article; it being understood that this passage is to be by navigating the Gulf of California and the River Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or in part run upon the River Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels,

or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and

all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted — all in the same way, and with

equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress

demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obligated themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole in-

terest accruing on such instalment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three; so that the Mexican republic shall be absolutely exempt, for the future, from all expense whatever on account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established by the government of the

United States, whose awards shall be final and conclusive: provided, that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eight hundred and forty-three;* and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants, any books, records, or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as Congress may designate, make an application in writing for the same, addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said board of commissioners: *Provided*, That no such application shall be made by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation, concluded at the city of Mexico on the fifth day of April, A. D. 1831, between the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind; the government of the United States hereby engaging and pledging its faith to establish, and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of or may have reason to suspect, and to

give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fradulently introduced.

Article XIX.

With respect to all merchandise, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed: —

1. All such merchandise, effects, and property, if imported, previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandise, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandise, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandise, effects, and property described in the two rules foregoing shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor

shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandise, effects, and property, described in the first and second rules, which shall have been removed to any place in the interior whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandise, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandise, effects, or property described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of th custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandise, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses at the time of the restoration of the same. And to all such merchandise, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good

neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

Article XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: —

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off all their effects without molestation or hinderance, conforming therein to the same laws which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence

and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take any thing from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties, and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have confortable quarters; and the common soldier shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall

be dealth with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

Article XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; by the President of the

Mexican republic, with the previous approbation of its General Congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we, the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and forty-eight.

N. P. TRIST,	[L. S.]
LUIS G. CUEVAS,	[L. S.]
BERNARDO COUTO,	[L. S.]
MIGL. ATRISTAIN,	[L. S.]

ARTICLES REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

First and Fifth Articles of the unratified Convention between the United States and the Mexican Republic of the 20th November, 1843.

ARTICLE I.

All claims of citizens of the Mexican republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by, the commission, nor by the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall

be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican republic, and the other two by the President of the United States, with the approbation and consent of the Senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics.

ARTICLE V.

All claims of citizens of the United States against the government of the Mexican republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the eleventh April, 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed, that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

APPENDIX H

Executive Orders Relating to the Jicarilla Apache Reservation

EXECUTIVE MANSION, FEBRUARY 11, 1887.

It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz., 27, 28, 29, and 30 north, ranges 1 east and 1. 2. and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided.* That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the laws of the United States providing for the disposition of the public domain.

GROVER CLEVELAND.

THE WHITE HOUSE, NOVEMBER 11, 1907.

It is hereby ordered that the following described lands in New Mexico. viz: Beginning at the northeast corner of township twenty-six north, range four west; thence east along the township line between townships twenty-six and twenty-seven north to the northwest corner of township twenty-six north, range five west; thence due south to the southeast corner of township twenty-two north, range five west; thence east on the township line between townships twenty-one and twenty-two north to the southeast corner of township twenty-two north, range one west; thence north to the northeast corner of township twenty-three north, range two west; thence west to the southeast corner of township twenty-four north, range four west; thence north

to the southeast corner of township twenty-six north, range four west; thence east to the southeast corner of township twenty-six north, range three west; thence north to the southeast corner of township twenty-seven north, range three west; thence east along the southern boundary of the present Jicarilla Indian Reservation to the range line between ranges one and two west, in township twenty-seven north, be, and the same are hereby, withdrawn from sale and settlement, and set apart for Indian purposes, for the use of the Indians of the Jicarilla Indian Reservation: *Provided.* That this withdrawal shall not affect any existing valid rights of any party.

THEODORE ROOSEVELT.

THE WHITE HOUSE, JANUARY 28, 1908.

Whereas it is found that Executive order of November 11, 1907, setting apart certain lands for the use of the Indians of the Jicarilla Indian Reservation, New Mexico, conflicts in part with Executive order of November 9, 1907, setting apart certain lands as an addition to the Navajo Indian Reservation, New Mexico, said Executive order is hereby so amended that the description of the tract of land thereby set apart for the purpose named therein shall read as follows:

Beginning at a point on the south boundary of the Jicarilla Indian Reservation on the range line between townships 26 and 27 north, ranges 2 and 3 west, New Mexico principal meridian: thence west on said south boundary to the southwest corner of the reservation; thence continuing west on the township line between townships 26 and 27 north to the northwest corner of township 26 north, range 5 west; thence south to the southwest corner of township 22 north, range 5 west; thence east along the township line

between townships 21 and 22 north to the northeast corner of township 21 north, range 4 west; thence continuing east over unsurveyed lands along what would be, if established, the township line between townships 21 and 22 north to what would be, if established, the southeast corner of township 22 north, range 2 west; thence north over unsurveyed lands to what will be when established the northeast corner of township 23 north, range 2 west; thence west over unsurveyed lands along what would be, if established, the township line between townships 23 and 24 north to what would be, if established, the southeast corner of township 24 north, range 4 west; thence north over unsurveyed lands to the southeast corner of township 25 north, range 4 west; thence continuing north along the east line of township 25 north, range 4 west, to the southeast corner of township 26 north, range 4 west; thence east over unsurveyed lands along what would be, if established, the township line between townships 25 and 26 north to what would be, if established, the southeast corner of township 26 north, range 3 west; thence north to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, FEBRUARY 17, 1912.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Carson National Forest, New Mexico, as proclaimed March 2, 1909, and modified by subsequent proclamation of August 24, 1910, be further modified by excluding therefrom all that part of the Jicarilla Apache Indian Reservation included in the said Carson National Forest by said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Jicarilla Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Carson National Forest had not been ordered, and said Indian Reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

APPENDIX I-1

(1) Jicarilla Tribal Oil and Gas Severance Tax Ordinance, July 9, 1976

(2) Amendment to Jicarilla Severance Tax Ordinance, January 26, 1977

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX
Ordinance No. 77-0-02

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED: That effective on the date set forth hereinafter, a severance tax is

imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax — Gas*

The severance tax set forth herein shall be at the rate of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax — Oil*

The severance tax set forth herein shall be at the rate of 29¢ per barrel of crude oil or condensate as measured under the terms of this ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be

remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of such gas, as reported by the operator or producer to the U. S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in acordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Fund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by the Treasurer, Transfer of Funds*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe on the 15th day of January, April, July and October, showing the amount of money collected and deposited in the oil and gas severance tax

fund, any amount of money paid under protest, and such other information as deemed necessary to determine the amount of money in the fund which is unencumbered.

The Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund, created by Tribal Ordinance No. 77-0-01, the amount of money which is unencumbered concurrently with the delivery of said report to the Tribal Council of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments.

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 6% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate under the laws of the United States. Any amount of

tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under § 11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

CERTIFICATION

The foregoing Ordinance was enacted by the Tribal Council of the Jicarilla Apache Tribe on the 9th day of July, 1976, by a vote of 6 for, 0 against, and 0 abstaining, at a duly called meeting at which a quorum of the Tribal Council members were present.

HUBERT VELARDE
President

ATTEST:
BARBARA GONZALES
Secretary

APPROVED:
Secretary of the Interior of the United States

APPENDIX I-2

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

AMENDMENT TO SEVERANCE TAX ORDINANCE
Ordinance No. 77-0-195

WHEREAS, the Tribal Council of the Jicarilla Apache Tribe adopted the Severance Tax Ordinance, being Ordinance No. 77-0-02, on July 9, 1976; and

WHEREAS, said Severance Tax Ordinance made no provision for funds for administration thereof; and it is deemed by the Tribal Council to be advisable to take 5% of the Severance Tax Fund for administration of the ordinance and to establish a tax administration division; and

WHEREAS, it is deemed advisable to change the interest rate to be paid on taxes illegally collected,

NOW, THEREFORE, BE IT ORDAINED that Paragraph 10 of said Ordinance No. 77-0-02, Severance Tax Ordinance, shall be amended to read as follows:

10. *Reports by the Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall

transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01 the amount of money which is reported to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

BE IT FURTHER ORDAINED that the sentence beginning on the ninth line of Paragraph 12, entitled "Taxes May Be Paid Under Protest", shall be amended to read as follows:

If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected.

CERTIFICATION

The foregoing ordinance was enacted by the Tribal Council of the Jicarilla Apache Tribe, on the 26th day of January, 1977, by a vote of 7 for, 0 against and 0 abstaining, at a duly called meeting at which a quorum of the Tribal Council members were present.

DALE VIGIL
President

ATTEST:
BARBARA GONZALES
Secretary

APPENDIX J-1

Notice of Clerk of Tenth Circuit dated July 24, 1979, of oral argument en banc.

TO: ALL COUNSEL IN THE CAPTIONED APPEALS

Re: Nos. 77-2102 and 77-2103 (Cross Appeals), Mescalero Apache Tribe v. Fred L. O'Cheskey, etc., et al.

Re: Nos. 78-1154 and 78-1251, J. Gregory Merrion, et al. v. Jicarilla Apache Tribe, et al.

Gentlemen:

The Court today, upon its own motion, has ordered the captioned appeals placed on the Calendar for oral argument and submission to the Court en banc on Wednesday, Septmeber 12, 1979, at 2:00 p.m. in Division I of the Court, C-404 United States Courthouse, 1929 Stout Street, Denver, Colorado 80294.

The Court wishes us to advise you that the Court would like the argument directed to the sovereignty issue.

Additional briefs or memoranda from the parties will be accepted for filing and presentation to the Court but the Court does not require you to file such briefs or memoranda.

Very truly yours,

HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

HKP:cb

APPENDIX J-2

NORDHAUS, MOSES & DUNN
ATTORNEYS AT LAW

August 2, 1979

Hon. Howard K. Phillips, Clerk
United States Court of Appeals
10th Circuit
469 United States Court House
Denver, Colorado 80294

Re: Nos. 78-1154 & 78-1251, *Merrion & Bayless, et al.* v. *Jicarilla Apache Tribe et al.*, consolidated with *Amoco Production Company, et al.*, v. *Jicarilla Apache Tribe, et al.*

Dear Mr. Phillips:

With respect to your letter of July 24, 1979, advising us that the Court had ordered the above appeal together with the appeal in *Mescalero Apache Tribe* v. *O'Cheskey* for oral argument on September 12, and that the Court would like the argument directed to the sovereignty issue, we respectfully request advice as to whether the Court desires the sovereignty issue to be directed to the question of sovereign power of the Tribe to tax, or sovereign immunity of the Tribe from suit, or both.

Very truly yours,

ROBERT NORDHAUS
ROBERT J. NORDHAUS
NORDHAUS, MOSES & DUNN
Attorneys for Jicarilla
Apache Tribe

RJN/am
cc: Counsel of Record

APPENDIX J-3

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

August 6, 1979

Mr. Robert J. Nordhaus
Nordhaus, Moses & Dunn
800 American Bank of Commerce Complex
200 Lomas Boulevard, N.W.
Albuquerque, New Mexico 87102

Re: Nos. 78-1154 and No. 78-1251, Merrion & Bayless, et al. v. Jicarilla Apache Tribe, et al.

Dear Mr. Nordhaus:

Your letter asks for a further interpretation of the sovereignty issue which the Court asked you to address in its letter of July 24, 1979.

The Court responds to your inquiry by saying that the sovereignty issue with which it is particularly concerned is the power to tax.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP: cb

cc: Ms. Maryann Walsh, Room 2343, Department of Justice, Washington, D.C. 20530
Mr. Jason W. Kellahin, Kellahin & Fox, P. O. Box 1769, Santa Fe, New Mexico 87501
Mr. Bruce D. Black, Campbell Bingaman & Black, P. O. Box 2208, Santa Fe, New Mexico 87501

Mr. Tom Burton, Mr. John Wimbish, Continental Oil Company, P. O. Box 2197, Houston, Texas 77001

Mr. Charles Sidun, Mr. Richard L. Marlar, Marathon Oil Company, Findlay, Ohio 45840

Mr. R. H. Landt, Amoco Production Company, Security Life Building, Denver, Colorado 80202

Mr. John R. Cooney, Mr. Mark B. Thompson, III, Modrall, Sperling, Roehl, Harris & Sisk, P. O. Box 2168, Albuquerque, New Mexico 87103

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Mr. Jan Unna, Special Assistant Attorney General, P. O. Box 630, Santa Fe, New Mexico 87503

Mr. Robert W. Corcoran, Special Assistant Attorney General, Montana Department of Revenue, Sam W. Mitchell Building, Helena, Montana 59601

No. 80-11, No. 80-15
(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. Gregory Merrion and Robert L. Bayless,
d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE
TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR, et al.,
Respondents,

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL., AND
CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

JOINT APPENDIX

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No. 80-11, July 3, 1980
No. 80-15, July 5, 1980

CASES CONSOLIDATED AND CERTIORARI GRANTED
OCTOBER 6, 1980

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No. 80-11, No. 80-15
Consolidated

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior, et al.,

Respondents,

AMOCO PRODUCTION COMPANY and MARATHON OIL COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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* A similar amendment of answer was filed in Case No. 77-292-P.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

LIST OF RELEVANT DOCKET ENTRIES

	Docket Entry Number	Date	Description of Docket Entry
	*		PRIOR TO CONSOLIDATION, REFERENCES ARE TO DOCKET ENTRY NUMBERS IN NO. 77-292P UNLESS OTHERWISE INDICATED.
	1	5/23/77	Complaint of Merrion, et al., with exhibits attached, filed in U.S. District Court, District of New Mexico.
	2	5/23/77	Motion for Preliminary Injunction.
343P	1	6/14/77	Complaint of Amoco Production Company, et al., with exhibits attached, filed in U.S. District Court, District of New Mexico.
343P	2	6/14/77	Motion for Preliminary Injunction by Plaintiffs.
343P	4	6/14/77	Application for Temporary Restraining Order by Plaintiffs with Affidavit in support attached.
		6/17/77	Hearing Re: Preliminary Injunction in Nos. 77-292P and 77-343P.
	31	7/ 1/77	Answer of Jicarilla Apache Tribe and Jicarilla Tribal Council, Case No. 77-292.
	43	7/ 5/77	Motion to Dismiss Suit or to Dismiss Preliminary Injunction by Defendant Jicarilla Apache Tribe.
	45	7/ 6/77	Court's Findings of Fact and Conclusions of Law (Payne), U.S. District Court, New Mexico.
	46	7/ 6/77	Preliminary Injunction that Defendants, agents, etc., are restrained and enjoined pending full determination of action from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of Plaintiffs; provided Plaintiffs first give security in amount of estimated three months' tax liability such bond to be approved by the Clerk of the Court no later than 7/6/77. (Payne).

	Docket Entry Number	Date	Description of Docket Entry
343P	22	7/ 6/77	Preliminary Injunction against Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde restraining them from collecting and enforcing the Jicarilla Oil and Gas Serverance Tax against the Plaintiffs provided that Plaintiffs give a bond in an amount equal to three months payment of the tax to cover costs and damages if Defendants shall be found to have been wrongfully enjoined, pending the determination of this action or until further order of this court. (Payne) Copies mailed to counsel.
	56	7/12/77	Motion for Rehearing by Defendant Jicarilla Apache Tribe.
343P	32	7/21/77	Answer by Defendants, Jicarilla Apache Tribe, Jicarilla Tribal Council, and Gwendolyn Velarde containing affirmative defenses, Case No. 77-343-P.
	87	8/ 3/77	Order granting leave to intervene to Mobil Oil Corp., and Oxy Petroleum, Inc., and to adopt allegations and prayers contained in Complaint of Plaintiffs' and in Motions filed by Plaintiffs; that proceedings taken in action shall be effective for and against Mobil Oil Corp., and Oxy Petroleum, Inc., and each are made parties plaintiff to action by this Order, upon each posting bond in amount of three months' estimated tax under Jicarilla Tribe Ordinance No. 77-0-02 as ordered. (Payne)
	88	8/ 3/77	Order to Consolidate Causes 77-292P and 77-343P (Payne)
		8/ 5/77	Pretrial Conference
	114	8/19/77	Pretrial Order (Payne)
	115	8/19/77	Answer by Defendants Jicarilla Apache Tribe and Jicarilla Tribal Council, to Complaint in Intervention, containing affirmative defenses.

Docket Entry Number	Date	Description of Docket Entry
126	8/24/77	Answer by Defendant Cecil Andrus, Secretary of Interior Re: 77-343P
127	8/24/77	Answer by Defendant Cecil Andrus, Secretary of Interior Re: 77-292P
128	8/25/77	Order that Defendants' Motion for a Rehearing of Preliminary Injunction and Defendants' Motion to Dissolve Preliminary Injunction are denied (Payne)
	8/29/77	Non-Jury Trial
194	10/21/77	Proposed Amendment of Answer of Jicarilla Apache Tribe and Jicarilla Apache Tribal Council in No. 77-292P.
195	10/21/77	Motion for Leave by Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council to Amend Answer and Rehearing on certain issues.
197	10/21/77	Proposed Amendment of Answer of Defendant Jicarilla Apache Tribe and Jicarilla Apache Tribal Council to Complaint in Intervention.
198	10/21/77	Proposed Amendment of Answer of Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde in No. 77-343P.
246	12/21/77	Order that the Defendants' Motion for Leave to Amend and for a Rehearing on certain issues is denied (Payne)
253	12/29/77	Court's Findings of Fact and Conclusions of Law.
254	12/29/77	Judgment that Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid, and void, that Permanent Injunction is issued and Defendants, their agents, servants, employees, and attorneys and all persons in active concert and participation with Defendants are restrained and enjoined from taking action to enforce or collect Jicarilla Apache Oil and Gas Severance Tax that Plaintiffs and Intervenors recover their costs to be taxed by Clerk of Court (Payne)

Docket Entry Number	Date	Description of Docket Entry
278	1/30/78	Notice of Appeal by Defendant Jicarilla Apache Tribe, of Order entered 12/29/77.
286	3/28/78	Notice of Appeal by Secretary of the Interior.
293	5/22/78	Order Dismissing Complaint in No. 343-P as against Antonio Martinez, Executive Secretary New Mexico Oil and Gas Accounting Commission, with leave to refile in event of final judgment adverse to Plaintiffs.

COMPLAINT OF
J. GREGORY MERRION, ET AL.,
NO. 77-292-P, U. S. DISTRICT COURT,
NEW MEXICO

No. 77-292-P

In The

United States District Court

For The District of New Mexico

J. Gregory Merrion and Robert L. Bayless,
d/b/a Merrion and Bayless, Jerome T. McHugh,
Chase Oil Company, a New Mexico Corporation,
Dugan Production Corporation, a New Mexico Corporation,
Consolidated Oil and Gas, Inc., a Colorado Corporation,
Southland Royalty Company, a Delaware Corporation,
Tesoro Petroleum Corporation, a Delaware Corporation,
Amerada Hess, a Delaware Corporation,
Supron Energy Corporation, a Delaware Corporation,
Energy Reserves Group, Inc., a Delaware Corporation,
J. M. Huber Corporation, a New Jersey Corporation,
Continental Oil Company, a Delaware Corporation,
Atlantic Richfield Company, a Pennsylvania Corporation,
Phillips Petroleum Company, a Delaware Corporation,
Tenneco Oil Company, a Delaware Corporation,
Getty Oil Company, a Delaware Corporation,
and Gulf Oil Corporation, a Pennsylvania Corporation,

Plaintiffs,

v.

Jicarilla Apache Tribe, Jicarilla Apache
Tribal Council and Cecil Andrus,
Secretary of the Interior,

Defendants.

COMPLAINT

(Filed May 23, 1977)

Come Now Plaintiffs, by and through their attorneys, and for their Complaint against the Defendants state:

First Cause of Action

1. J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, are residents of the State of New Mexico.

2. JEROME T. MCHUGH is a resident of the State of New Mexico.

3. CHASE OIL COMPANY is a New Mexico Corporation with its principal place of business in New Mexico.

4. DUGAN PRODUCTION CORPORATION is a New Mexico Corporation with its principal place of business in New Mexico.

5. CONSOLIDATED OIL AND GAS, INC. is a Colorado Corporation with its principal place of business in Colorado.

6. SOUTHLAND ROYALTY COMPANY, formerly Aztec Oil and Gas is a Delaware Corporation with its principal place of business in the State of Texas.

7. TESORO PETROLEUM CORPORATION is a Delaware Corporation with its principal place of business in the State of Texas.

8. AMERADA HESS is a Delaware Corporation with its principal place of business in the State of New York.

9. SUPRON ENERGY CORPORATION, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. ENERGY RESERVES GROUP, INC. is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. HUBER CORPORATION is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. CONTINENTAL OIL COMPANY is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. ATLANTIC RICHFIELD COMPANY is a Pennsylvania Corporation located within the State of California.

14. PHILLIPS PETROLEUM COMPANY is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. TENNECO OIL COMPANY is a Delaware Corporation with its principal place of business located within the State of Texas.

16. GETTY OIL COMPANY is a Delaware Corporation with its principal place of business located in California.

17. GULF OIL CORPORATION is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Defendant, JICARILLA APACHE TRIBE, (hereinafter referred to as the "Tribe") is an Indian Tribe organized pursuant to 25 U.S.C. § 476-477, residing on an Executive Order Indian reservation within the State of New Mexico.

19. The legislative powers of the Jicarilla Apache Tribe reside in the Defendant, JICARILLA APACHE TRIBAL COUNCIL, (hereinafter "Tribal Council").

20. The Defendant, CECIL ANDRUS, is the Secretary of the Interior of the United States of America.

21. The matter in controversy exceeds the sum of Ten Thousand ($10,000) Dollars exclusive of interest and costs.

22. This action arises under Article I, Section 8, Clause 3 of the United States Constitution; the Fifth Amendment to the United States Constitution; 25 U.S.C. § 398(c); and 5 U.S.C. § 706, all as more fully appears hereinafter. Federal question jurisdiction is thus conferred on this Court by 28 U.S.C. § 1331.

23. The Tribe is now and has been at all pertinent times the beneficial owner of the royalty interest created by oil and gas leases on its Executive Order reservation lands which were sold

by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398 and 25 U.S.C. § 396.

24. The contract numbers and property descriptions contained in the oil and gas leases referred to in Paragraph 22 above are included in Exhibit "A", attached hereto and incorporated herein by reference. A copy of the lease form typically used is attached hereto and made a part hereof as Exhibit "B".

25. On or about November 22, 1968, the Tribe, without lawful authority or procedure, adopted a "Revised Constitution," which reads in relevant part:

> "The Tribal Council may levy and collect taxes and fees on Tribal members, and may enact ordinances subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the Tribe doing business on the reservation."

26. On information and belief the Amended Constitution adopted by the Tribe on December 23, 1968 was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969 without hearing or due consideration.

27. On or about July 9, 1976 the Tribal Council, without lawful authority, adopted Ordinance No. 77-0-02, as amended to levy an oil and gas severance tax of five cents per million British Thermal Units (BTU) of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation and twenty-nine cents per barrel on crude oil or condensate produced on the Reservation and sold or transported off the Reservation. A copy of said Ordinance is attached hereto and made a part hereof as Exhibit "C", and referred to hereinafter as the Jicarilla Oil and Gas Severance Tax.

28. On information and belief the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit "C", was approved by the Secretary of the Interior of the United States on or about December 23, 1976 without hearing or due consideration.

29. Along with the copy of the Ordinance attached hereto as Exhibit "C" the Jicarilla Apache tribe served upon each of the Plaintiffs a copy of instructions on the applicability and procedural requirements of the Jicarilla Oil and Gas Severance Tax contained in Exhibit "C". Said instructions are attached hereto and made a part hereof as Exhibit "D". Under instructions contained in Exhibit "D", Plaintiffs are ordered to submit "initial operator's report remittance forms" within forty-five days after April 30, 1977. The instructions attached hereto as Exhibit "D" further provide that "initial tax remittances are also due at that time."

30. Plaintiffs would be irreparably harmed by having to pay such tax under protest in that they would have to pass such tax on to their customers and attempt to recover the tax from the Tribe. There is no guarantee under the Jicarilla Oil and Gas Severance Tax that any Jicarilla Tax assessments paid by the Plaintiffs under protest would be returned. To the contrary, Paragraph 11 of the Jicarilla Oil and Gas Severance Tax specifically provides:

> "Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of a credit against future tax payments."

31. Plaintiffs have no plain, speedy and adequate remedy at law.

32. In so adopting, approving, and undertaking the implementation of the severance tax ordinance attached hereto as Exhibit "C" without notice to, or an opportunity for a hearing by, the Plaintiffs, the Defendants have denied the Plaintiffs the *due process of law* guaranteed them by *Fifth Amendment* to the United States Constitution and the *Indian Civil Rights Act*, 25 U.S.C. § 1301, *et seq.*, and Article II, Section 18 of the *New Mexico Constitution.*

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any

action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

Second Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the first Cause of Action by reference as though fully stated herein.

2. The Jicarilla Oil and Gas Severance Tax embodied in Exhibit "C" applies only to oil and gas "produced on the Jicarilla Apache Reservation" and thus imposes a discriminatory tax upon Plaintiffs, not imposed upon oil and gas produced from similarly situated land held in trust by the federal government or similarly situated land in the San Juan Basin, a well-defined and well known producing area of oil and gas in northwest New Mexico, and such tax thus denies Plaintiffs the equal protection of law.

3. The Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax attached hereto as Exhibit "C" and thus denied Plaintiffs the equality of law guaranteed to them by the Fifth Amendment to the United States Constitution.

4. In enacting, adopting and implementing Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Jicarilla Tribal Council denied Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302 and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any

action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Third Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. Under each of the leases described in Exhibit "A" the Secretary of the Interior, as trustee for the Tribe, contracted and agreed he would not thereafter approve any ordinance or regulation which would effect any change in the rate of royalty under the lease, without the written consent of the parties to the lease. Such clause requires lessees to abide by duly promulgated regulations within the following limitations:

> "Regulations. — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 C.F.R. 221: *Provided* that no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

3. Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, is a regulation "effecting a change in rate of royalty or annual rental".

4. By approving Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Secretary of the Interior, as trustee for the Jicarilla Apache Tribe, has breached and violated the express provisions of Plaintiff's leases.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance

Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax on any of the Plaintiffs named herein or, in the *alternative, to award Plaintiffs the full present value of each of the leases* outlined in Exhibit "A" and for such other and further relief as the Court shall deem just.

Fourth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action as though the same were set forth fully herein.

2. The Secretary of the Interior's action approving the Jicarilla Oil and Gas Severance Tax was arbitrary, capricious, not in accordance with law, contrary to Constitutional right, in excess of his statutory jurisdiction, in violation of his contracts with Plaintiffs and without observance of the procedure required by law, all in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

3. Plaintiffs are persons suffering a legal wrong, adversely affected and aggrieved by the above described action of the Secretary of the Interior under 5 U.S.C. § 701, *et seq.*

4. The Secretary of the Interior's action as described hereinbefore is final and reviewable pursuant to 5 U.S.C 701, et seq.

WHEREFORE the Plaintiffs pray this court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from any of the Plaintiffs named herein; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the defendants from taking any action whatsoever to facilitate

the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Fifth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. In 25 U.S.C. § 398 and 398(c) Congress gave the states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells, "or rights, property or assets of any lessee upon lands within Executive Order Indian reservations in the same manner as such taxes are otherwise levied and collected."

3. Pursuant to the Congressional authorization provided in 25 U.S.C. § 398 and 398(c), New Mexico has imposed and collected a severance tax on oil and gas produced on the Jicarilla Apache Reservation. In 1975, New Mexico received $636,391.00 in revenue from just the gas severance tax imposed on gas produced on the Jicarilla Apache Reservation and it is estimated such figure will be substantially higher in 1977.

4. In addition to an Oil and Gas Severance Tax, the State of New Mexico imposes and collects the Oil and Gas Emergency School Tax, an Oil and Gas Conservation Tax, the Oil and Gas Ad Valorem Tax, the Oil and Gas Production Equipment Ad Valorem Tax and the Natural Gas Processors Tax on the Plaintiffs' oil and gas production on the Jicarilla Reservation.

5. The state is required to impose the taxes described above in order to provide governmental services to the Jicarilla Apache Reservation.

6. The Jicarilla Oil and Gas Severance Tax amounts to 12% of the interstate price of old gas and when interposed upon the New Mexico Severance Tax collected on the same gas the combined tax burden amounts to 29% of the interstate price of old

gas. Such tax is passed on under contract to the ultimate gas consumer.

7. The Jicarilla Oil and Gas Severance Tax is therefore, without Congressional authorization and in direct conflict with the oil and gas severance tax levied and collected by the State of New Mexico from the Plaintiffs pursuant to express Congressional authorization.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax and for such other relief as the Court deems just.

Sixth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action by reference as though fully stated herein.

2. In 1934 Congress enacted the Indian Reorganization Act, 25 U.S.C. 476-477. That Act granted to Indian Tribes certain specified powers in addition to those which they had previously exercised. The Indian Reorganization Act did not expressly grant Indian Tribes the power of taxation over non-Indian's use of reservation property.

3. The Jicarilla Apache Tribe had never claimed, had not been granted nor had it exercised any power of taxation over activities of non-Indians on their Executive Order Reservation prior to 1934; therefore under the provisions of the Indian Reorganization Act, 25 U.S.C. Section 476-477, the Jicarilla Apache Tribe now lacks Congressional authorization to tax the activities of non-Indians upon their Reservation and particularly those oil and gas leases which have been expressly sanctioned and

authorized by the Secretary of the Interior, acting on behalf of the Tribe under specific Congressional authority (25 U.S.C.A. § 398 and 398(c)), which gave the exclusive authority to tax such oil and gas production to the states.

WHEREFORE the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax, that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax as enacted by the Tribal Council of the Jicarilla Apache Tribe and for such other relief the Court deems just.

Seventh Cause of Action

1. Plaintiffs adopt Paragraphs 1 through 31 of the First Cause of Action as though the same were set forth fully herein.

2. Title 4 of the Jicarilla Tribal Oil and Gas Severance Tax, attached hereto as Exhibit "C", provides an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe."

3. The written instructions from the Tribe to the Plaintiffs, attached hereto as Exhibit "D", direct that the tax should be paid on gas, crude oil or condensate "produced on the Jicarilla Apache reservation and sold or transported off the reservation."

4. The Interstate Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution prohibits a discriminatory tax from being unequally applied against interstate commerce.

5. Since the Jicarilla Oil and Gas Severance Tax applies only to gas and oil "sold or transported off the reservation" such tax is violative of Article I, Section 8, Clause 3, of the United States Constitution.

WHEREFORE: the Plaintiffs pray this Court to enter a *temporary injunction* prohibiting the Defendants from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax; that upon notice to all of the parties named herein and the opportunity for hearing, the Court enter a *permanent injunction* prohibiting any of the Defendants from taking any action whatsoever to enforce or facilitate the collection of the Jicarilla Oil and Gas Severance Tax and for such other and further relief as the Court shall deem just.

Eighth Cause of Action

1. Plaintiffs incorporate Paragraphs 1 through 31 inclusive of the First Cause of Action as though the same were fully set forth herein.

2. This portion of the Complaint is brought as a declaratory judgment action to determine the constitutional and contractual rights of the parties hereto pursuant to 28 U.S.C. 2201, *et seq.*

3. An actual justicable controversy exists between the Plaintiffs and the Defendants as to the constitutionality, legality and applicability of the Jicarilla Oil and Gas Severance Tax, as contained in Exhibit "C" to the oil and gas leases issued to the Plaintiffs by the Secretary of the Interior and more fully described in Exhibit "A".

WHEREFORE Plaintiffs request that this Court declare: (1) that the plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit "C", (2) that the Jicarilla Apache Tribal Council was without legal authority to issue such ordinance, that the (3) Secretary of the Interior's approval of such ordinance was unlawful and unconstitutional, that such (4) ordinance is void and of no effect, and that the (5) Jicarilla Apache Tribe lacks legal power and authority to impose any nature of tax upon or with respect to oil and gas production from Reservation lands.

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By: .....
Bruce D. Black

EXHIBIT NO. A

Chase Oil Company, Inc.

Contract No.	Description
70	T24N, R4W: Secs. 27, 28, 34, Sec. 33 – N/2, SE/4
71	T23N, R4W: Sec. 3 – N/2, SW/4; Secs. 9, 10
47	T23N, R4W: Sec. 11 – S/2; Sec, 12; Sec. 14 – NE/4
363	T22N, R4W: Sec. 21 – S/2
15	T23N, R3W: Secs. 19, 20; Sec. 29 – SW/4

Dugan Production Corporation

Contract No.	Description
416	T24N, R4W: Secs. 25, 26, 35, 36
241	T28N, R1W: Sec. 14 – W/2 SW/4
12	T24N, R5W: Sec. 21 – SE/4
127	T24N, R4W: Sec. 3 – NE/4
116	T26N, R3W: Sec. 21
117	T26N, R3W: Sec. 27 – W/2
465	T30N, R1 E: Sec. 6 – NW/4
453	T29N, R3W: Sec. 15, 16, 21, 22
37-A	T24N, R5W: Sec. 13 – SW/4; Sec. 14 – NE/4, SW/4; Sec. 23 – NE/4

Consolidated Oil & Gas, Inc.

Contract No.	Description
97	T26N, R3W: Secs. 5, 6, Sec. 7 – E/2 Sec. 8 – W/2
101	T26N, R4W: Sec. 2 – Lots 1, 2, 3, 4, S/2 N/2 S/2, Sec. 11
106	T26N, R4W: Sec. 26 – E/2
105	T26N, R4W: Sec. 13 – E/2
116	T26N, R3W: Sec. 22 – S/2
117	T26N, R3W: Sec. 34 – E/2; Sec. 27 – E/2
119	T26N, R4W: Sec. 6 – Lots 3, 4, 5, 6, 7, SE/4 NW/4, E/2, SW/4 (W/2); Sec. 5 – Lots 1, 2, 3, 4, S/2, N/2, S/2
152	T26N, R5W: Sec. 8 – N/2

Energy Resources Group

Contract No.	Description
35	T24N, R5W: Sec. 1; Sec. 2 – N/2, SW/4, Sec. 11 – NW/4, Sec. 12 – N/2, SE/4 T24N, R5W: Sec. 35 – S/2; Sec. 36 – S/2

J. M. Huber Corporation

Contract No.	Description
506	T29N, R2W: Secs. 27, 28, 33, 34
504	T29N, R2W: Sec. 17; Sec. 18 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 19 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 20
503	T29N, R2W: Secs. 15, 16, 21, 22
499	T29N, R2W: Sec. 1 – Lots 1, 2, 3, 4, S/2 N/2, S/2 Secs. 11, 12
495	T29N, R1W: Sec. 5 – Lots 1, 2, 3, 4, S/2 N/2, S/2; Sec. 6 – Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, E/2 SW/4, SE/4; Sec. 7 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 8
486	T28N, R2W: Sec. 5 – Lots 1, 2, 3, 4 S/2 N/2 S/2; Sec. 6 – Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, E/2 SW/4, SE/4; Sec. 7 – Lots 1, 2, 3, 4, E/2 W/2, E/2; Sec. 8

Supron Energy Corporation

Contract No.	Description
10	T25N, R5W: Sec. 33 – S/2; Sec. 34 – S/2 T24N, R5W: Secs. 3, 4; Sec. 9 – N/2; Sec. 10 – N/2
107	T26N, R4W: Secs. 27, 28, 33, 34
106	T26N, R4W: Secs. 25, 26, 35, 36
105	T26N, R4W: Secs. 13, 14, 23, 24
101	T26N, R4W: Sec. 1 – Lots 1, 2, 3, 4, S/2 N/2, S/2; Sec. 2 – Lots 1, 2, 3, 4 S/2 N/2, S/2; Secs. 11, 12
104	T26N, R4W: Secs. 15, 16, 21, 22

Supron Energy Corporation — Continued

Contract No.	Description
103	T26N, R4W: Sec. 17; Sec. 18 – Lots, 1, 2, 3, 4, E/2, E/2 W/2; Sec. 19 – Lots 1, 2, 3, 4, E/2, E/2 W/2; Sec. 20
100	T26N, R3W: Secs. 29, 30, 31, 32
47	T23N, R4W: Secs. 11, 12, 13, 14
418	T24N, R5W: Sec. 3 – W/2; Sec. 4 – SW/4 Sec. 9 – NW/4
150	T26N, R5W: Secs. 1, 2, 11, 12
417	T22N, R3W: Secs. 9, 10, 15, 16
153	T26N, R5W: Secs. 25, 26, 35, 36
145	T25N, R5W: Secs. 1, 2, 11, 12
10	

Southland Royalty Company
Aztec Oil & Gas Co., subsidiary

Contract No.	Description
100	T26N, R3W: Secs. 29, 30, 31, 32
101	T26N, R4W: Secs. 1, 2, 11, 12
103	T26N, R4W: Secs. 17, 18, 19, 20
105	T26N, R4W: Secs. 13, 14, 23, 24
106	T26N, R4W: Secs. 25, 26, 35, 36
145	T25N, R5W: Secs. 1, 2, 11, 12
150	T26N, R5W: Secs. 1, 2, 11, 12
153	T26N, R5W: Secs. 25, 26, 35, 36
124	T25N, R4W: Secs. 13, 14, 23, 24
125	T25N, R4W: Secs. 25, 26, 35, 36
151	T26N, R5W: Secs. 3, 4, 9, 10
416	T24N, R4W: Secs. 25, 26, 35, 36
446	T27N, R3W: Secs. 7, 8, 17
447	T27N, R3W: Secs. 18, 19
449	T28N, R3W: Secs. 19, 30, 31
451	T24N, R3W: Secs. 3, 4, 9, 10
452	T29N, R3W: Secs. 5, 6, 7, 8
456	T30N, R3W: Secs. 1, 2, 11, 12
457	T30N, R3W: Secs. 3, 4, 9, 10
458	T30N, R3W: Secs. 5, 6, 7, 8

Southland Royalty Company
Aztec Oil & Gas Co., subsidiary — Continued

Contract No.	Description	
459	T30N, R3W:	Secs. 17, 18, 19, 20
460	T30N, R3W:	Secs. 15, 16, 21
461	T30N, R3W:	Secs. 13, 14, 24
462	T30N, R3W:	Secs. 22, 23, 26
463	T30N, R3W:	Secs. 25, 35, 36
464	T30N, R3W:	Secs. 29, 30, 31, 32
466	T28N, R3W:	Sec. 3
467	T28N, R3W:	Sec. 29
468	T28N, R3W:	Sec. 32
469	T29N, R3W:	Sec. 17
470	T29N, R3W:	Sec. 18
471	T29N, R3W:	Sec. 27
471	T29N, R3W:	Sec. 34
475	T31N, R3W:	Secs. 21, 22, 27, 28
476	T31N, R1W:	Secs. 23, 24, 25, 26
434	T22N, R4W:	Secs. 4, 5, 6,
435	T22N, R4W:	Secs. 7, 8, 9, 10
443	T23N, R2W:	Secs. 25, 26, 35, 36

Atlantic Richfield Company

Contract No.	Description	
111	T24N, R4W:	Secs. 5, 6, 7, 8
108	T26N, R4W:	Secs. 13, 14, 23, 24
109	T26N, R5W:	Secs. 15, 16, 21, 22
110	T26N, R5W:	Secs. 17, 18, 19, 20

Phillips Petroleum Company

Contract No.	Description	
81	T29N, R3W:	Secs. 19, 20, 29, 30
82	T29N, R3W:	Secs. 31, 32
	T28N, R3W:	Secs. 5, 8
83	T28N, R3W:	Secs. 6, 7, 16, 17, 18
84	T28N, R3W:	Secs. 20, 21, 28, 33

Phillips Petroleum Company — Continued

Contract No.	Description
90	T27N, R3W: Secs. 9, 10, 16, 21, N/2 Sec. 15
92	T27N, R3W: Secs. 20, 29, 30, 31
93	T27N, R3W: Secs. 28, 32, 33, 34
60	T28N, R3W: Secs. 14, 15, 22, 23
61	T28N, R3W: Secs. 26, 27, 34, 35

Getty Oil Company

Contract No.	Description
34	T25N, R5W: Sec. 21 – S/2; Sec. 22 – W/2; Secs. 27, 28; Sec. 33 – N/2; Sec. 34 – N/2
68	T25N, R5W: Secs. 31, 32 T24N, R5W: Secs. 5, 6
44	T23N, R4W: Secs. 5, 6, 7, 8

Continental Oil Company

Contract No.	Description
38	T24N, R5W: Secs. 31, 32 T23N, R5W: Secs. 5, 6
39	T24N, R5W: Sec. 33 - S/2; Sec. 34 - S/2 T23N, R5W: Secs. 3, 4
77	T23N, R5W: Secs. 9, 10, 15, 16
102	T26N, R4W: Secs. 3, 4, 9, 10
109	T26N, R5W: Secs. 15, 16, 21, 22
110	T26N, R5W: Secs. 17, 18, 19, 20
121	T25N, R4W: Secs. 1, 2, 11, 12
122	T25N, R4W: Secs. 3, 4, 9, 10
124	T25N, R4W: Secs. 13, 14, 23, 24
147	T25N, R5W: Secs. 5, 6, 7, 8
151	T26N, R5W: Secs. 3, 4, 9, 10
36	T24N, R5W: Sec. 9 - S/2; Sec. 10 - S/2; Secs. 15, 16; Sec. 21 - N/2; Sec. 22 - N/2
41	T25N, R4W: Secs. 29, 30, 31, 32
66	T25N, R4W: Secs. 27, 28, 33, 34
65	T25N, R4W: Secs. 15, 16, 21, 22
64	T25N, R4W: Secs. 17, 18, 19, 20

Continental Oil Company — Continued

Contract No.	Description
48	T24N, R4W: Secs. 17, 18, 19, 20
78	T23N, R5W: Secs. 11, 12, 13, 14
125	T25N, R4W: Secs. 25, 26, 35, 36
65	T23N, R4W: Secs. 17, 18, 19, 20
108	T26N, R5W: Secs. 13, 14, 23, 24

Chace Oil Company, Inc.

Contract No.	Description
70	T24N, R4W: Secs. 27, 28, 34, Sec. 33 - N/2, SE/4
71	T23N, R4W: Sec. 3 - N/2, SW/4; Secs. 9, 10
47	T23N, R4W: Sec. 11 - S/2; Sec. 12; Sec. 14 - NE/4
363	T22N, R4W: Sec. 21 - S/2
15	T23N, R3W: Secs. 19, 20; Sec. 29 - SW/4

Dugan Production Corporation

Contract No.	Description
241	T28N, R1W: Sec. 14 - W/2 SW/4
12	T24N, R5W: Sec. 21 - SE/4
127	T24N, R4W: Sec. 3 - NE/4
116	T26N, R3W: Sec. 21
117	T26N, R3W: Sec. 27 - W/2
465	T30N, R1E: Sec. 6 - NW/4
453	T29N, R3W: Sec. 15, 16, 21, 22
37-A	T24N, R5W: Sec. 13 - SW/4; Sec. 14 - NE/4, SW/4; Sec. 23 - NE/4

Consolidated Oil & Gas, Inc.

Contract No.	Description
97	T26N, R3W: Secs. 5, 6, Sec. 7 - E/2; Sec. 8 - W/2
101	T26N, R4W: Sec. 2 - Lots 1, 2, 3, 4, S/2 N/2 S/2, Sec. 11

Consolidated Oil & Gas, Inc. — Continued

Contract No.	Description
106	T26N, R4W: Sec. 26 - E/2
105	T26N, R4W: Sec. 13 - E/2
116	T26N, R3W: Sec. 22 - S/2
117	T26N, R3W: Sec. 34 - E/2; Sec. 27 - E/2
119	T26N, R4W: Sec. 6 - Lots 3, 4, 5, 6, 7, SE/4 NW/4, E/2 SW/4 (W/2); Sec. 5 - Lots 1, 2, 3, 4, S/2 N/2, S/2
152	T26N, R5W: Sec. 8 - N/2

Energy Resources Group

Contract No.	Description
35	T24N, R5W: Sec. 1; Sec. 2 - N/2, SW/4, Sec. 11 - NW/4; Sec. 12 - N/2, SE/4
25	T24N, R5W: Sec. 35 - S/2; Sec. 36 - S/2

Jerome T. McHugh

Contract No.	Description
82	
84	
90	
98	
115	
116	
117	
120	

Amerada Hess Corporation

Contract No.	Description

Tenneco Oil Company

Contract No.	Description
108	T26N, R4W: Secs. 13, 14, 23, 24
109	T26N, R5W: Secs. 15, 16, 17, 18
110	T26N, R5W: Secs. 17, 18, 19, 20
111	T24N, R4W: Secs. 5, 6, 7, 8
420	T22N, R3W: Secs. 29, 30, 31, 32

Tesoro Petroleum Corporation

Contract No.	Description
420	T22N, R3W: Sec. 29 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4; Sec. 30 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4 Sec. 31 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4; Sec. 32 – E/2 NE/4, E/2 NW/4, W/2 SE/4, W/2 SW/4

Contract, Jicarilla Tribal 119

Form 5-157
November 1947

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

OIL AND GAS MINING LEASE — TRIBAL INDIAN LANDS
JICARILLA APACHE TRIBE, STATE OF NEW MEXICO

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 24th day of April, 1953, by and between Frank Vigil, Chairman of the Jicarilla Apache Tribal Council of Dulce, State of New Mexico, for and on behalf of the Jicarilla Apache Tribe of Indians, designated herein as lessor, and Phillips Petroleum Company of Bartlesville, State of Oklahoma, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of $71,345.99, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Rio Arriba, State of New Mexico, and more particularly described as follows:

Tract No. 216 — Township 26 North, Range 4 East, N.M.P.M. Section 5, Lots 1, 2, 3, 4, S/2 W/2, S/2 (ALL)

Section 6, Lots 1, 2, 3, 4, 5, 6, 7, S/2 NE/4, SE/4 NW/4, N/2 SW/4, SE/4 (ALL) Section 7, Lots 1, 2, 3, 4, E/2 W/2, E/2 (ALL) Section 8, ALL

containing 2557.18 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe-lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(a) *Bond.* — To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(b) *Wells. — (1) To drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, to compensate the lessor in full each month for the estimated loss of royalty through drainage:* PROVIDED, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and production shall be with the consent of, and in an amount determined by the Secretary of the Interior; (2) at the election of the lessee to drill

and produce other wells: PROVIDED, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (3) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operation of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified.

(c) *Rental and royalty.* — To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lesssee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount

realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: PROVIDED, That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: AND PROVIDED FURTHER, That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in Section 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the treasurer of said tribe* or the superintendent. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the treasurer of said tribe or to the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, cr on the products therof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is greater.

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* All payments under this lease shall be made to the superintendent where the tribe is not organized under the act of June 18, 1934 (48 Stat. 984).

(d) *Monthly statements.* — To furnish to the oil and gas supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the treasurer of said tribe or the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

(e) *Log of well.* — To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lessee showing the strata and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.

(f) *Diligence, prevention of waste.* — To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to

prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations; PROVIDED, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

(g) *Regulations.* — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: PROVIDED, That no regulation hereafter approved shall effect a change in rate or royalty or annual rental herein specified without the written consent of the parties to this lease.

(h) *Assignment of lease.* — Not to assign this lease or any interest therein by an operating agreement or otherwise not to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

4. The lessor expressly reserves:

(a) *Disposition of surface.* — The right to lease, sell or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lessee herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.

(b) *Use of gas.* — The right to use sufficient gas free of charge for any school or other buildings belonging to the tribe on said lands by making connection at its own expenses with the

well or wells thereon, the use of such gas to be at the lessor's risk at all times.

(c) *Royalty in kind.* — The right to elect on 30 days' written notice to take lessor's royalty in kind.

5. Surrender and termination. — The lessee shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of the sum of one dollar and all rentals, royalties, and other obligations due and payable to the lessor; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lessee shall file a recorded release with his application to the superintendent for termination of this lease.

6. Cancellation and forfeiture. — When, in the opinion of the Secretary of the Interior and the Tribal Council, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: PROVIDED, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee.

7. Removal of buildings, improvements, and equipment. — Lessee shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material,

and/or equipment placed thereon for the purpose of development and operation hereunder, save and except casing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all casing in wells, material structures, and equipment shall be and become the property of the lessor.

8. Drilling and producing restrictions. — It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

9. Unit operation. — The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

10. Helium—public emergency. — It is covenanted and agreed that helium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing helium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the

option to purchase all or any part of the products produced under this lease.

11. Conservation. — The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.

12. Heirs and successors in interest. — It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

13. No lease, assignment thereof, or interest therein, will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

The attached Special Stipulation in two pages and the Forest and Land Protection Stipulation in two pages, are hereby made part of this lease.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

_____

P.O. _____

_____

P.O. _____

[SEAL]

s/ FRANK VIGIL

Frank Vigil, *Chairman*
Jicarilla Apache Tribal Council

[SEAL]

s/ CEVERO JARAMILLO

Cevero Jaramillo, *Secretary*
Jicarilla Apache Tribal Council

[SEAL]

Two witnesses to execution by lessee:

s/ OWEN J. JONES

P.O. Bartlesville, Oklahoma

s/ NORMA BUTCHER

P.O. Bartlesville, Oklahoma

PHILLIPS PETROLEUM COMPANY

By _____

Title _____
Vice President

Attest: _____
Assistant Secretary

ACKNOWLEDGEMENT OF LESSOR

STATE OF New Mexico
COUNTY OF Rio Arriba ss.

Before me, a notary public, on this 24th day of April, 1953, personally appeared FRANK VIGIL, Chairman of the Jicarilla Apache Tribal Council, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

My commission expires August 24, 1956

[SEAL]

s/ SYLVAN C. VERMILLION
Sylvan C. Vermillion
Notary Public

UNITED STATES
DEPARTMENT OF THE INTERIOR
Washington, D.C., June 15, 1953

The within lease is hereby ..... approved.

Approved under authority delegated by Secretarial Order No. 2508, January 11, 1949 (14 F.R. 258-260) Order No. 551, Amendment 3 16 F.R. 8252

Commissioner of Indian Affairs

Filed for record this 28 day of August, 1957 at 1 o'clock p.m.

Received 8-28, 1957 in Vol. 31, Page 303-306.

s/ JESSE S. SALAZAR
County Clerk or Recorder

Rental received $.....

EXHIBIT D

TO: ALL OIL AND GAS LESSEES, OPERATORS AND PURCHASING COMPANIES DOING BUSINESS ON THE JICARILLA APACHE RESERVATION

Enclosed is a copy of the Oil and Gas Severance Tax Ordinance No. 77-0-2 enacted by the Tribal Council of the Jicarilla Apache Tribe on July 9, 1976 and approved on behalf of the Secretary of the Interior December 22, 1976.

The Oil and Gas Severance Tax Ordinance levies a severance tax of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the reservation, and a severance tax of 29¢ per barrel of crude oil or condensate, as measured under the terms of the ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the reservation.

The effective date of the severance tax is the first day of the fourth month following the approval of the ordinance by the Tribal Council and the Secretary of the Interior or his authorized representative. The effective date of the tax is April 1, 1977, and initial Operator's Report Remittance forms are due in the Accounting Office of the Tribe for the month of April, 1977, within 45 days after April 30, 1977. Initial tax remittances are also due at that time.

Enclosed for your reference is the Operator's Remittance Report form to be used in reporting taxes remitted. Instructions for completion of the report are printed on the back of the report.

Thank you for your cooperation.

JICARILLA APACHE TRIBE

GENERAL INSTRUCTIONS

Remitting Period

Each calendar month is a reporting period.

Who Must Report

Each operator must report monthly on the Operator's Remittance Form. Each operator must report all of his production each month.

Who Must Admit Taxes

Taxes shall be remitted to the Tribe by the operator of a well. However, a purchaser may, by express or implied agreement with the operator, remit taxes on behalf of the operator. One of the persons must report all taxes due on an individual well, or one report may be filed for all wells on a lease.

Due Date Of Report And Remittance

Operator's reports and accompanying remittances are due in the Accounting Office of the Tribe, P.O. Box 507, Dulce, New Mexico 87528, within 45 days following the end of the calendar month covered by the report. There is no provision for an extension of the prescribed due date. Interest on past due taxes will be computed at the rate of 1% per month or fraction thereof.

Tax Refunds

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe. Any refund allowed may be in the form of credit against future tax payments.

To apply for a tax refund, an operator must submit an amended Operator's Remittance Report, using the same form as the Operator's Remittance Report, but showing the tax properly computed and attaching a copy of the original Operator's Remittance Report. Accompanying this should be a letter of explanation to the Treasurer of the Tribe requesting a refund.

Taxes Paid Under Protest

Any person paying a severance tax may pay such tax under protest by filing a Notice of Protest with the Treasurer of the Tribe *at the time of payment.* The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded, and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 6% per annum shall be allowed on the amount erroneously or illegally collected.

INSTRUCTION FOR OPERATOR'S REMITTANCE REPORT

Lease No., Reporting Period, Lessee, Operator, Reporting Company

Fill in all information requested. If supplemental reports are necessary, please number each page in the upper right-hand corner. The lease number to be reported is the Jicarilla Apache tract number as shown on the lease.

Well No. Column

Describe each well as clearly as possible and provide the well number used in the Bureau of Indian Affairs well completion report.

Production Volume

For each product produced, report the barrels of oil and condensate and the MCF of natural gas. For natural gas provide the average BTU content. Taxes on natural gas are to be paid on the basis of a rate per million BTU of gas produced on the reservation and sold or transported off the reservation. To arrive at the million BTU tax basis for natural gas, multiply the volume of production in MCF by the BTU content and report the million

BTU tax base in the column provided. Report volume to the nearest whole barrel or MCF.

Tax Rate

Insert the appropriate tax rate in the tax rate column as follows:

Natural gas	$0.05 per million BTU
Oil and condensate	$0.29 per barrel

Tax Remitted

Insert the amount of tax remitted for each product in the "Tax Remitted" column. This amount is calculated by multiplying the tax rate by the tax base, which is barrels of production for oil and condensate, and million BTUs of production for natural gas. Add the total tax remitted for each product on each well to arrive at the total tax remitted for the lease. Fill in the name of the payor of the check and the check number.

JICARILLA APACHE TRIBE
OIL & GAS ACCOUNTING OFFICE

P. O. Box 507 Dulce, N.M. 87520

SEVERANCE TAX DIVISION

OPERATOR'S REMITTANCE REPORT

Lease No._____

Report Period_____, 19____ to_____, 19____

Lessee:_____

_____

(Address)

Operator:_____

_____

(Address)

Reporting Company (If different from Operator):

_____

_____

(Address)

Well No.	Product	Production Volume (Bbls or MCF)	BTUs (Gas)	Million BTUs (Gas)	Tax Rate	Tax Remitted
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					
	Oil					
	Condensate					
	Gas					

(Use supplemental sheets if necessary)

TOTAL TAX REMITTED_____

Paid by Check No._____

This Report, submitted by _____(company), consisting of ____ pages, had been examined by me and to the best of my knowledge and belief it is true, complete and pursuant to law.

_____ _____ _____

Signature Title Date

JICARILLA APACHE TRIBE
ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX

Ordinance No. 77-0-02
as amended by Ordinance No. 77-0-195

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED; That effective on the date set forth hereinafter, a severance tax is imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax — Gas*

The severance tax set forth herein shall be at the rate of $.05 per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax — Oil*

The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of

such gas, as reported by the operator or producer to the U.S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in accordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Refund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money in the fund which is unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01, the amount of money which is reported

to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments..

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate

under the laws of the United States. Any amount of tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under §§11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

Adopted by the Tribal Council July 9, 1976

Approved by the Secretary of the Interior December 23, 1976

COMPLAINT OF
AMOCO PRODUCTION COMPANY, ET AL.,
NO. 77-343-P, U. S. DISTRICT COURT,
NEW MEXICO

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

AMOCO PRODUCTION COMPANY, a corporation and MARATHON OIL COMPANY, a corporation,
Plaintiffs,

v. No. 77-343-P

JICARILLA APACHE TRIBE; JICARILLA APACHE TRIBAL COUNCIL; GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache tribe; CECIL ANDRUS, Secretary of the Interior; TONY MARTINEZ, Executive Director, New Mexico Oil and Gas Accounting Commission,
Defendants.

COMPLAINT

(Filed June 14, 1977)

For their claims against the Defendants, Plaintiffs state:

COUNT I

1. Amoco Production Company (Amoco) is a Delaware corporation with its principal place of business in Illinois.

2. Marathon Oil Company (Marathon) is an Ohio corporation with its principal place of business in Ohio.

3. Defendant Jicarilla Apache Tribe (hereinafter referred to as the "Tribe") is an Indian tribe organized pursuant to 25 U.S.C. § 476-477, residing on an executive order Indian reservation within the State of New Mexico.

4. The legislative powers of the Jicarilla Apache Tribe reside in the Defendant, Jicarilla Apache Tribal Council (hereinafter "Tribal Council"). The Defendant Gwendolyn Velarde is the

Treasurer of the Jicarilla Apache Tribe and as such is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

5. The Defendant Cecil Andrus is the Secretary of the Interior of the United States of America.

6. The Defendant Tony Martinez, is the duly appointed and acting Executive Director of the New Mexico Oil and Gas Accounting Commission and as such is responsible for the enforcement and collection of the following taxes levied and collected by the State of New Mexico upon production of oil or gas by Plaintiffs from leases held by Plaintiffs upon lands within the Executive Order Reservation of the Tribe:

A. Oil and Gas Severance Tax Act, N.M.S.A. § 72-19-1, *et seq.*;

B. Oil and Gas Emergency School Tax Act, N.M.S.A. § 72-21-1, *et seq.*;

C. Oil and Gas Ad Valorem Production Tax Act, N.M.S.A. § 72-22-1, *et seq.*;

D. Oil and Gas Production Equipment Ad Valorem Tax Act, N.M.S.A. § 72-24-1, *et seq.*;

E. Oil and Gas Conservation Tax Act, N.M.S.A. § 72-20-1, *et seq.*

7. The matter in controversy exceeds the sum of ten thousand ($10,000) dollars exclusive of interest and costs.

8. This action arises under Article I, Section 8, Clause 3 of the United States Constitution; Article II, Section 2 of the United States Constitution; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; 25 U.S.C. §§ 476 and 477; 25 U.S.C. § 1301, *et seq.*; 25 U.S.C. § 398(c); 42 U.S.C. § 1983; and 5 U.S.C. § 706, all as more fully appears herein. Federal question

jurisdiction is thus conferred on this Court by 28 U.S.C. § 1331 and jurisdiction is also conferred by 28 U.S.C. § 1343(3).

9. The Tribe is now and has been at all pertinent times the beneficial owner of the royalty interest created by oil and gas leases on its Executive Order Reservation Lands, which leases were granted by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398 and 25 U.S.C. § 396.

10. Plaintiffs each hold one or more oil and gas leases granted by the Secretary of the Interior as described in paragraph 9 above, covering lands within the Executive Order Reservation of the Tribe. A copy of the lease form typically used is attached hereto and made a part hereof as Exhibit A. Plaintiffs each produce oil or gas from the lands covered by such leases.

11. On or about November 22, 1968, the Tribe, without lawful authority or procedure, adopted a "Revised Constitution," which reads in relevant part:

> "The Tribal Council may levy and collect taxes and fees on Tribal members, and may enact ordinances subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the Tribe doing business on the reservation."

12. On information and belief the Amended Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, without hearing or due consideration.

13. On or about July 9, 1976, the Tribal Council, without lawful authority, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, to levy an oil and gas severance tax of five cents per million British Thermal Units (BTU) of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation and twenty-nine cents per barrel on crude oil or condensate produced on the reservation and sold or transported off the reservation. A copy of said Ordinance is

attached hereto and made a part hereof as Exhibit B, and referred to hereinafter as the Jicarilla Oil and Gas Severance Tax.

14. On information and belief the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit B, was approved by the Secretary of the Interior of the United States on or about December 23, 1976, without hearing or due consideration.

15. Along with the copy of the ordinance attached hereto as Exhibit B, the Jicarilla Apache Tribe served upon each of the Plaintiffs a copy of instructions on the applicability and procedural requirements of the Jicarilla Oil and Gas Severance Tax contained in Exhibit B. Said instructions are attached hereto and made a part hereof as Exhibit C. Under instructions contained in Exhibit C, Plaintiffs are ordered to submit "initial operator's report remittance forms" within forty-five days after April 30, 1977, or no later than June 14, 1977. The instructions attached hereto as Exhibit C further provide that "initial tax remittances are also due at that time."

16. In the event such tax is ultimately held to be invalid, Plaintiffs would be irrevocably harmed by having to pay such tax under protest in that they would be forced to attempt to recover the tax from the Tribe. There is no quarantee under the Jicarilla Oil and Gas Severance Tax that any Jicarilla tax assessements paid by the Plaintiffs under protest would be returned. To the contrary, Paragraph 11 of the Jicarilla Oil and Gas Severance Tax specifically provides: "Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of a credit against future tax payments."

17. Plaintiffs have no plain, speedy and adequate remedy at law.

18. In so adopting, approving and undertaking the implementation of the severance tax ordinance attached hereto as Exhibit B without notice to, or an opportunity for a hearing by

the Plaintiffs, the Defendants, Tribe, Tribal Council, Velarde, and Secretary of the Interior have denied the Plaintiffs the due process of law guaranteed them by Fifth and Fourteenth Amendments to the United States Constitution and the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiffs incorporate paragraphs 1 through 18 of Count I of this Complaint by reference as though fully set forth herein.

2. The Jicarilla Oil and Gas Severance Tax embodied in Exhibit B applies only to oil and gas "produced on the Jicarilla Apache Reservation" and thus imposes a discriminatory tax upon Plaintiffs, not imposed upon oil and gas produced from similarly situated land held in trust by the federal government or similarly situated land in the San Juan Basin, a well-defined and well-known producing area of oil and gas in northwest New Mexico, and such tax thus denies Plaintiffs the equal protection of law.

3. The Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax attached hereto as Exhibit B and thus denied Plaintiffs the equality of law guaranteed to them by the Fifth Amendment to the United States Constitution.

4. In enacting, adopting and implementing Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Jicarilla Tribal Council denied Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302 and Article II, Section 18 of the New Mexico Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT III

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. Under each of the leases described in Count I the Secretary of the Interior, as trustee for the Tribe, contracted and agreed he would not thereafter approve any ordinance or regulation which would effect any change in the rate of royalty under the lease, without the written consent of the parties to the lease. Such clause requires lessees to abide by duly promulgated regulations within the following limitations:

> "Regulations. — To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including 30 C.F.R. 221: *Provided* that no regulation hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease."

3. Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, is a regulation effecting "a change in rate of royalty or annual rental."

4. By approving Jicarilla Tribal Council Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, the Secretary of the Interior, as trustee for the Jicarilla Apache Tribe, has breached and violated the express provisions of Plaintiffs' leases.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT IV

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The Secretary of the Interior's action approving the Jicarilla Oil and Gas Severance Tax was arbitrary, capricious, not in accordance with law, contrary to Constitutional right, in excess of his statutory jurisdiction, in violation of his contracts with Plaintiffs and without observance of the procedure required by law, all in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*

3. Plaintiffs are persons suffering a legal wrong, adversely affected and aggrieved by the above-described action of the Secretary of the Interior under 5 U.S.C. § 701, *et seq.*

4. The Secretary of the Interior's action as described hereinbefore is final and reviewable pursuant to 5 U.S.C. § 701, *et seq.*

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT V

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In 25 U.S.C. §§ 398 and 398(c) Congress gave the states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells, "or rights, property or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected."

3. Pursuant to the Congressional authorization provided in 25 U.S.C. §§ 398 and 398(c), New Mexico has imposed and collected taxes on oil and gas produced on the Jicarilla Apache Reservation. In 1975, New Mexico received $636,391.00 in revenue from just the gas severance tax imposed on gas produced on the Jicarilla Apache Reservation and it is estimated such figure will be substantially higher in 1977.

4. In addition to an Oil and Gas Severance Tax, the State of New Mexico imposes and collects the Oil and Gas Emergency School Tax, an Oil and Gas Conservation Tax, the Oil and Gas Ad Valorem Tax, and the Oil and Gas Production Equipment Ad Valorem Tax on the Plaintiffs' oil and gas production on the Jicarilla Reservation.

5. The State is required to impose the taxes described above in order to provide governmental services to the Jicarilla Apache Reservation.

6. The Jicarilla Oil and Gas Severance Tax amounts to 17% of the interstate price of old gas and when interposed upon the New Mexico taxes on production collected on the same gas the combined tax burden amounts to 29% of the interstate price of old gas. Such tax may be passed on under contract to the ultimate gas consumer only after approval by the Federal Power Commission.

7. The Jicarilla Oil and Gas Severance Tax is therefore, without Congressional authorization and in direct conflict with the taxes levied on production and collected by the State of New Mexico from the Plaintiffs pursuant to express Congressional authorization and, in addition, is contrary to the Commerce Clause of the United States Constitution.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VI

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In 1934, Congress enacted the Indian Reorganization Act, 25 U.S.C. 476-477. That Act granted to Indian Tribes certain specified powers in addition to those which they had

previously exercised. The Indian Reorganization Act did not expressly grant Indian Tribes the power of taxation over non-Indian's use of reservation property.

3. The Jicarilla Apache Tribe had never claimed, had not been granted nor had it exercised any power of taxation over activities of non-Indians on their Executive Order Reservation prior to 1934; therefore under the provisions of the Indian Reorganization Act, 25 U.S.C. Section 476-477, the Jicarilla Apache Tribe now lacks Congressional authorization to tax the activities of non-Indians upon their Reservation and particularly those oil and gas leases which have been expressly sanctioned and authorized by the Secretary of the Interior, acting on behalf of the Tribe under specific Congressional authority (25 U.S.C. §§ 398 and 398(c)), which gave the exclusive authority to tax such oil and gas production to the states.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VII

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. Title 4 of the Jicarilla Tribal Oil and Gas Severance Tax, attached hereto as Exhibit B, provides an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe."

3. The written instructions from the Tribe to the Plaintiffs, attached hereto as Exhibit C, direct that the tax should be paid on gas, crude oil or condensate "produced on the Jicarilla Apache reservation and sold or transported off the reservation."

4. The Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution prohibits a discriminatory tax from being unequally applied against interstate commerce.

5. Since the Jicarilla Oil and Gas Severance Tax applied only to gas and oil "sold or transported off the reservation" such tax is violative of Article I, Section 8, Clause 3, of the United States Constitution.

WHEREFORE the Plaintiffs pray that this court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT VIII

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The Amended Charter of the Tribe adopted on or about June 16, 1960, provides in Section 5 thereof that the powers exercised by the Tribe are: "Subject to any restrictions contained in the Constitution and Laws of the United States."

3. The revised Constitution of the Tribe adopted on or about November 22, 1968, provides in Article XI, Section 1, that the powers of the Tribal Council, including the asserted power to levy and collect taxes as quoted in paragraph 11 of Count I of this Complaint, shall be subject to: "Limitations imposed by the Constitution of the United States, applicable federal statutes and regulations of the Department of the Interior."

4. No provisions of the United States Constitution, any Indian Treaty, or statute adopted by the United States grants the Tribe or the Tribal Council any power to levy and collect any tax such as the Jicarilla Oil and Gas Severance Tax.

5. 25 U.S.C. §§ 398 and 398(c), granting the states the exclusive right, power and authority to levy taxes on the output of oil and gas wells "or rights, property or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected" constitutes a limitation upon the right or power, if any, of the Tribe or Tribal Council to levy and collect taxes and fees on non-members of the Tribe doing business on the reservation.

6. The adoption and enactment of the Jicarilla Oil and Gas Severance Tax and any attempt to enforce the same or collect taxes thereunder is contrary to the relevant provisions, quoted above, of the Amended Charter of the Tribe and of the Revised Constitution of the Tribe.

7. By reason thereof, the Tribe and Tribal Council were without power and authority to enact the Jicarilla Oil and Gas Severance Tax and the same is invalid.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter

a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT IX

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. The right or power, if any, of the Tribe or Tribal Council to levy and collect taxes and fees on non-members of the Tribe doing business on the reservation, may be exercised only to exclude such non-members from the Reservation.

3. By its consent to the issuance of the oil and gas leases described in paragraphs 9 and 10 of Count I of this Complaint, which such oil and gas leases were issued prior to the attempted enactment and imposition of the Jicarilla Oil and Gas Severance Tax, the Tribe consented to the presence upon the Reservation of Plaintiffs and other holders of oil and gas leases.

4. In enacting, adopting and implementing the Jicarilla Oil and Gas Severance Tax, the Tribe and Tribal Council denied Plaintiffs rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. § 1302.

WHEREFORE the Plaintiffs pray that this Court enter a temporary restraining order and, after hearing, a preliminary injunction, prohibiting the Defendants Tribe, Tribal Council, Velarde, and Secretary of the Interior from taking any action to enforce or collect the Jicarilla Oil and Gas Severance Tax from the Plaintiffs named herein; that upon final hearing, the Court enter a permanent injunction prohibiting any of the Defendants Tribe, Tribal Council, Velarde, and the Secretary of the Interior from taking any action whatsoever to enforce or facilitate the enforcement of the Jicarilla Oil and Gas Severance Tax; and for such other and further relief as the Court shall deem just.

COUNT X

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. This portion of the Complaint is brought as a declaratory judgment action to determine the constitutional and contractual rights of the parties hereto pursuant to 28 U.S.C. § 2201, *et seq.*

3. An actual justiciable controversy exists between the Plaintiffs and the Defendants Tribe, Tribal Council and the Secretary of the Interior as to the constitutionality, legality, and applicability of the Jicarilla Oil and Gas Severance Tax.

WHEREFORE Plaintiffs request that this Court declare that the Plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, attached hereto as Exhibit B, that the Jicarilla Apache Tribal Council was without legal authority to issue such ordinance, and the Defendant Velarde is without legal authority to collect such tax, that the Secretary of the Interior's approval of such ordinance was unlawful and unconstitutional, that such ordinance is void and of no effect, and that the Jicarilla Apache Tribe lacks legal power and authority to impose any nature of tax upon or with respect to oil and gas production from reservation lands.

COUNT XI

1. Plaintiffs incorporate paragraphs 1 through 18 in Count I of this Complaint by reference as though fully set forth herein.

2. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to these Plaintiffs, then one or more of the taxes levied and collected by the Defendant Martinez, as described in paragraph 6 of Count I of this Complaint, is invalid for one or more of the following reasons:

A. If the Jicarilla Oil and Gas Severance Tax is held to be valid notwithstanding 25 U.S.C. §§ 398 and 398(c), or upon a determination that 25 U.S.C. §§ 398 and 398(c) are

invalid, then the state taxes authorized, levied and collected by reason of 25 U.S.C. §§ 398 and 398(c) are invalid.

B. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid by reason of a determination that the Tribe and Tribal Council possess the power to levy and collect a tax upon the severance of natural resources from lands located within the Executive Order Reservation of the Tribe, then the attempt to levy and collect such taxes by the State of New Mexico may be invalid.

3. In the event the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to these Plaintiffs, and by reason thereof one or more of the state taxes specified in paragraph 6 of Count I of this Complaint are held to be invalid, then the Defendant Martinez is and will be acting in excess of lawful authority and jurisdiction and in violation of the Constitution or laws of the United States in attempting to levy, collect and enforce such state taxes.

4. An actual justiciable controversy exists between the Plaintiffs and the Defendant Martinez as to the constitutionality, legality and applicability of the state taxes described in paragraph 6 of Count I of this Complaint, in the event the Jicarilla Oil and Gas Severance Tax should be held valid and applicable to these Plaintiffs.

5. Plaintiffs are entitled to a declaratory judgment determining the constitutional and statutory rights of the Plaintiffs and the Defendant Martinez pursuant to 28 U.S.C. § 2201, *et seq.*

WHEREFORE Plaintiffs request, in the event that the Jicarilla Oil and Gas Severance Tax should be held valid and applicable to these Plaintiffs, that this Court determine and declare the rights of the Plaintiffs and the Defendant Martinez with respect to the state taxes described in paragraph 6 of Count I of this Complaint.

COUNT XII
(Interpleader)

1. Plaintiffs incorporate the allegations of Counts I through XI of this Complaint by reference as though fully set forth herein.

2. Plaintiffs produce oil and gas from the leases held by them on lands within the Executive Order Reservation of the Tribe. The majority of production from such leases is gas. The gas produced from such leases is sold in interstate commerce and is subject to price regulation by federal authorities.

3. Under its agreements with the purchasers of gas produced from such leases, and subject to the regulations and orders of the Federal Power Commission, Plaintiffs are entitled to seek to pass on to such purchasers such taxes of the nature of the Jicarilla Oil and Gas Severance Tax on gas or the state taxes on gas described in paragraph 6 of Count I of this Complaint.

4. If the Jicarilla Oil and Gas Severance Tax should be held invalid, the only means available to Plaintiffs to recover such taxes if the same had been paid to the Tribe would consist of the refund and protest procedures set forth in Sections 11 and 12 of the Jicarilla Oil and Gas Severance Tax, a copy of which is attached hereto as Exhibit B. For the reasons stated in paragraph 16 of Count I, such remedy is inadequate in that Section 11 of the Jicarilla Oil and Gas Severance Tax allows the Tribe to make any refund in the form of a credit against future tax payments. Accordingly, Plaintiffs have filed this action seeking injunctive relief against the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

5. Amounts paid to the State of New Mexico pursuant to the taxes described in paragraph 6 of Count I, if invalid, may be recovered by Plaintiffs by paying the same under protest and filing actions in the Santa Fe County District Court of the State of New Mexico for refund. As Plaintiffs cannot know with

certainty at this time whether or not the Jicarilla Oil and Gas Severance Tax will be held invalid, and whether or not as a consequence thereof one or more of the state taxes may be held invalid, Plaintiffs will pay such applicable state taxes (for the period commencing April 1, the effective date of the Jicarilla Oil and Gas Severance Tax) under protest and will file refund actions in the Santa Fe County District Court.

6. Plaintiffs are required to take such actions in order to avoid irreparable loss, for the reason that if Plaintiffs voluntarily paid, without protest or refund action, the Jicarilla Oil and Gas Severance Tax and the state taxes and were able to pass the same on to their purchasers, and if any portion of such taxes should later be held invalid, if Plaintiffs are required to refund the same to their purchasers, Plaintiffs may be unable to recover such erroneous and illegal payments from the State or the Tribe. Therefore, in order to protect Plaintiffs from an irreparable loss, Plaintiffs have filed this action seeking injunctive relief against enforcement and collection of the Jicarilla Oil and Gas Severance Tax, and will protest the payment of the taxes levied by the State of New Mexico upon the same activity sought to be taxed by the Jicarilla Oil and Gas Severance Tax and seek refund of such taxes.

7. Plaintiffs stand ready, willing and able to pay any and all taxes which this Court should determine are valid and legal and applicable to Plaintiffs.

8. For the reasons stated in Count XI above, and because the Jicarilla Oil and Gas Severance Tax and the state taxes stated in paragraph 6 of Count I seek to tax the same activity, the claims of the Tribe for the Jicarilla Oil and Gas Severance Tax and the claims of Defendant Martinez for state taxes, for any period after April 1, 1977, are such that Plaintiffs are or may be exposed to double or multiple liability.

9. In the event the claims of the Tribe for the Jicarilla Oil and Gas Severance Tax and the claims of the Defendant Martinez for the state taxes were to be paid, Plaintiffs would be compelled to make double payments in connection with a single liability.

10. In order to avoid the possibility of such double or multiple liability and in order to avoid the possibility of inconsistent determinations as to the validity of either the Jicarilla Oil and Gas Severance Tax or the state taxes, Defendants Tribe, Tribal Council, Velarde, and Martinez should be required to interplead their claims for taxes due upon severance of oil and gas by Plaintiffs from lands within the Executive Order Reservation of Tribe on and after April 1, 1977.

11. In order to preserve the rights of all parties *pendente lite*, further proceedings in the state court refund actions to be filed by Plaintiffs should be stayed pending final determination by this Court as to the validity of the taxes. In addition, Plaintiffs should be required or permitted to post sufficient security, or pay into Court, any and all state taxes which may be due for severance by Plaintiffs of oil and gas from lands within the Executive Order Reservation of the Tribe pending final determination of this action, and if the Court should determine that Plaintiffs are not entitled to injunctive relief against enforcement and collection of the Jicarilla Oil and Gas Severance Tax pending final judgment herein, then Plaintiffs should be required or permitted to post sufficient security or pay such taxes into Court pending final judgment herein.

WHEREFORE, Plaintiffs pray as follows:

A. That the Court enter its Order requiring the Defendants Tribe, Tribal Council, Velarde, and Martinez to interplead their claims to taxes due on and after April 1, 1977, for the severance of oil or gas by Plaintiffs from lands within the Executive Order Reservation of the Tribe;

B. That upon such interpleader and after final hearing, that the Court determine which of such taxes are due and owing by Plaintiffs and enter an Order binding upon all Defendants in respect thereto;

C. That upon the filing of an appropriate Motion by Plaintiffs, Plaintiffs be required or permitted to post sufficient security or deposit into Court taxes which may become due for such taxes during the pendence of this action; and

D. For such other relief as the Court deems proper.

R. H. LANDT, ESQ.
Amoco Production Company
Security Life Building
Denver, Colorado 80202

RICHARD L. MARLAR, ESQ.
Marathon Oil Company
Findlay, Ohio 45840

MODRALL SPERLING ROEHL
HARRIS & SISK
P.O. Box 2168
Albuquerque, New Mexico 87103
(505) 243-4511

By_____
John R. Cooney
Attorneys for Plaintiffs

EXHIBITS OMITTED IN PRINTING

Exhibit A — Oil and Gas lease dated Dec. 4, 1953, Tract #251, in same form as Exhibit B to Complaint of Merrion, et al, No. 77-292-P. The special stipulations to the subject Oil and Gas leases are printed, *infra,* as part of Exhibit A to the Complaint in No. 77-343-P. [These special stipulations were part of the Oil and Gas lease attached to the Complaint in No. 77-292-P but were not filed with the same in the record below.]

Exhibit B — Jicarilla Apache Tribal Oil and Gas Severance Tax Ordinance and Instructions. Attached as Exhibits C and D to Complaint of Merrion, et al, No. 77-292-P.

[Exhibit A to Complaint in No. 77-343-P.]

Jicarilla Tribal Land — Oil and Gas Lease

SPECIAL STIPULATIONS

A. If so required by the Superintendent, the lessee shall condition under the direction of the Supervisor, United States Geological Survey, any wells drilled which do not produce oil or gas in paying quantities as determined by the said Supervisor, but are capable of producing water satisfactory for domestic, agricultural, or livestock use, in such manner as to make the best and largest quantity of water available for use by the lessors. Adjustment of cost for conditioning of the well and for value of casing and equipment left in or on the well will be made in said cases where it is determined that the well will produce water satisfactorily as aforesaid.

B. The lessee shall employ available Jicarilla Indian labor in all positions for which they are qualified, including truck driving, and shall protect the Indian farming and grazing rights to the surface of the lands.

C. The lessee will be required to execute a Forest and Land Protection Stipulations as part of this lease. Copy attached.

The foregoing stipulations are hereby acknowledged and made a part of oil and gas lease Contract No. Jicarilla Apache Tribal 154 executed December 4, 1951 covering Tract No. 251.

Lessee: THE OHIO OIL COMPANY
Signature by: s/_____

Lessor: _____
(Initial)

Title: _____

ATTEST: s/_____
Assistant Secretary

Jicarilla Tribal Lands

FOREST LAND PROTECTION STIPULATION

The land embraced in this lease issued under the Act of May 11, 1938, (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lease hereby agrees:

(1) *Protection of Property.* To conduct all operations authorized by this lease with due regard to preventing damage to vegetation, timber, soil, crops, roads and improvements, and preventing water and soil pollution and also to restore the land wherever disturbed by necessary operations to its original condition at the completion of operations as determined by the Superintendent or his authorized representative. To fence all sump holes and other excavations made by lessee's operation whenever required in writing by the Superintendent or his authorized representative.

(2) *Reimbursement for Damage.* To reimburse the lessor for any and all damage to destruction of property of the lessor caused by lessee's operations hereunder and not authorized by this lease: to save and hold the lessor harmless from all damages or claims for damage to persons or property resulting from lessee's operations under this lease; to hold lessor, the leased land and all materials, tools, machinery, appliances, structures, improvements, and equipment of whatsoever kind or nature, placed in or upon the leased land by the lessee or at his direction, harmless from all claims or liens of third parties by reason of any act of commission or omission on the part of lessee; and where the surface of the leased land is owned by other than the lessor, to pay such owner, or his tenant, as the case may be, for damage or injury to livestock, crops, trees, pipe lines, buildings, and other improvements on the leased land.

(3) *Construction and Location of Roads.* All roads constructed by the lessee to obtain access to his leasehold or for other purposes will only be permitted when authorized in writing

by the Superintendent or his authorized representative, and all due precautions will be taken to keep such roads from developing into washes and resultant loss of soil. Be it further understood that if requested by the Superintendent or his authorized representative, such roads will be restored to their original vegetated condition insofar as possible.

(4) *Use of Timber on Land.* Not to cut or destroy timber owned by the lessor without first obtaining permission from the Superintendent or his authorized representative, and to pay for all such timber cut or destroyed at current local stumpage rates prescribed by such officer.

(5) *Fire Prevention and Suppression.* (a) To do all in his power to prevent and suppress forest, brush, or grass fires on the leased land and in its vicinity, and to require his employees of contractors or subcontractors to do likewise. Unless prevented by circumstances over which he has no control, the lessee shall place his employees, contractors, subcontractors, and employees of contractors and subcontractors employed on the lease land at the disposal of any authorized officer of the Department of the Interior for the purpose of fighting forest, brush, or grass fires, with the understanding that payment for such services shall be made at rates to be determined by the officer in charge, which rates shall not be less than the current rates of pay prevailing in the vicinity for services of a similar character; Provided, that if the lessee, his employees, contractors, subcontractors, or employees of contractors or subcontractors, caused or could have prevented the origin or spread of the said fire or fires, no payment shall be made for services so rendered.

(b) During periods of serious fire danger to forest, brush, or grass, as may be specified by the Superintendent, or his authorized representative, the lessee shall prohibit smoking and the building of camp and lunch fires by his employees, contractors, subcontractors, and employees of contractors or subcontractors within the leased area except at established camps,

and shall enforce this prohibition by all means within his power; Provided, that the Superintendent or his authorized representative may designate safe places where, after all inflammable material has been cleared away, camp fires may be built for the purpose of heating lunches and where, at the option of the lessee, smoking may be permitted.

(c) The lessee shall not burn rubbish, trash, or other flammable material except with the consent of the Superintendent or his authorized representative and shall not use explosives in such manner as to scatter inflammable materials on the surface of the land during the forest, brush, or grass fire season, except as authorized to do so on areas approved by such officer.

(d) The lessee shall build or construct such fire lines or do such clearing as the Superintendent or his authorized representative decides is necessary for forest, brush, and grass fire prevention, and shall maintain such fire tools at his headquarters on the leased land as are deemed necessary by such officer.

(6) *Location of Camp Site.* If lessee shall construct any camp on the land within the Jicarilla Indian Reservation, such camp shall be located at the place approved by the Superintendent or his authorized representative, and such officer shall have authority to require that such camp be kept in a neat and sanitary condition.

(7) The foregoing stipulations are hereby made a part of Oil and Gas Lease executed December 4, 1956 covering TRACT No. 251.

Lessee: THE OHIO OIL COMPANY
By: s/_____

Lessor:_____ Title: Vice-President
ATTEST: s/_____

ANSWER,
JICARRILLA APACHE TRIBE, ET AL.,
CASE NO. 77-292-P. (MERRION)

[Caption, Civil No. 77-292-P Omitted in Printing]

ANSWER
(Filed July 1, 1977)

COMES NOW the Defendants JICARILLA APACHE TRIBE, and JICARILLA TRIBAL COUNCIL, by their attorneys, Nordhaus, Moses & Dunn, and for their answer to Plaintiffs' Complaint state:

FIRST CAUSE OF ACTION

1. These Defendants are without sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 1 through 17 and therefore deny the same.

2. These Defendants admit the allegations of Paragraphs 18, 19, 20 and 21.

3. In response to paragraph 22, Defendants deny that this action arises under Article I, Section 8, Clause 3 of the United States Constitution or 25 U.S.C. § 398c or 5 U.S.C. § 706. Defendants admit that federal question jurisdiction is conferred on this Court by 28 U.S.C. § 1331.

4. In response to Paragraph 23, Defendants admit that the Tribe is the beneficial owner of the royalty interest created by oil and gas leases which were sold by the Secretary of the Interior pursuant to 25 U.S.C. §398 and 25 U.S.C. §396. Defendants deny that they consented to these leases because the Tribal Council was not fully informed as to the legal and environmental implications regarding some of these leases.

5. In response to Paragraph 24, Defendants deny that any oil and gas leases are referred to in Paragraph 22 of Plaintiffs' Complaint and also deny that Exhibit "A" to Plaintiffs' Complaint is correct because Defendants have insufficient information to form a belief as to the truth of the allegations therein.

Defendants further deny that Exhibit "B" to Plaintiffs' Complaint is a copy of the lease form typically used because it omits the special Stipulations included in these leases.

6. In response to Paragraph 25, Defendants admit that the Tribe adopted a Revised Constitution, including provisions for taxation, but Defendants deny that they acted without lawful authority or procedure or that said Constitution was adopted on or about November 22, 1968. Defendants state affirmatively that the *Revised Constitution* of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968 and duly approved by the Undersecretary of the Interior on February 13, 1969.

7. In response to Paragraph 26, Defendants admit that the Revised Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, but Defendants deny that his approval was without due consideration. Defendants state affirmatively that no hearing is required by law prior to the Secretary's, or his delegated representative's, approval of a tribal constitution.

8. In response to Paragraph 27, Defendants admit that the Tribal Council, on or about July 9, 1976, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, (Exhibit "C" to the Complaint) but Defendants deny that the Tribal Council acted without lawful authority. Defendants state affirmatively that the Tribal Council acted with full constitutional authority when adopting said ordinance.

9. In response to Paragraph 28, Defendants admit that the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the Secretary of the Interior of the United States on or about December 23, 1976, but Defendants deny that the Secretary acted without due consideration. Defendants state affirmatively that no hearing is required by law prior to the approval by the Secretary, or his delegated representative, of a Tribal Council Ordinance.

10. Defendants admit the allegations contained in Paragraph 29 of Plaintiffs' Complaint.

11. Defendants deny each and every allegation contained in Paragraphs 30, 31, and 32 of Plaintiffs' Complaint.

SECOND CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. In response to Paragraph 2, these Defendants admit that the Jicarilla Oil and Gas Severance Tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" but deny that said tax is discriminatory as to Plaintiffs or that such tax denies Plaintiffs the equal protection of law. Defendants state affirmatively that the Defendant Tribal Council only has authority over activities within the boundaries of the Jicarilla Apache Reservation and therefore cannot tax production outside its jurisdiction.

3. In response to Paragraph 3, these Defendants admit that the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax Ordinance, but deny that the Plaintiffs were denied the equality of law guaranteed them by the Fifth Amendment to the United States Constitution. Defendants state affirmatively that the Fifth Amendment to the United States Constitution does not apply to Indian Tribes and therefore Plaintiffs fail to state a claim upon which relief can be granted.

4. Defendants deny each and every allegation contained in Paragraph 4 of Plaintiffs' Second Cause of Action. Defendants state affirmatively that Plaintiffs were not denied equal protection under the Indian Civil Rights Act because the tax is not discriminatory between producers or purchasers of natural gas and oil doing business on the Reservation.

THIRD CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 3 and 4 of Plaintiffs' Third Cause of Action.

FOURTH CAUSE OF ACTION

1. In response to Paragraph 1, these Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 2, 3 and 4 of Plaintiffs' Fourth Cause of Action. Defendants state affirmatively that Plaintiffs have failed to set forth in their Fourth Cause of Action why the Secretary's approval of the tax was arbitrary, capricious and not in accordance with law. Therefore, Plaintiffs' fail to state a claim upon which relief can be granted.

FIFTH CAUSE OF ACTION

1. In response to paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants deny each and every allegation contained in Paragraphs 2, 5 and 7 of Plaintiffs' Fifth Cause of action. Defendants state affirmatively that 25 U.S.C. § 398(c) does not specifically pre-empt taxation by the Tribe in favor of the State of New Mexico and such pre-emption cannot be read into the statute by implication. There is no statute which "requires" the State to impose a severance tax to fund state governmental services to the Tribe and in fact, the state provides only limited services to the Tribe and its members. 25 U.S.C. § 321 cited by Plaintiffs does not obligate the State to provide such services. By the terms of the Indian Reorganization Act, the Tribe has Congressional authorization to tax and the Tribe's severance tax

does not conflict with the tax as levied by the State of New Mexico.

3. Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 3, 4 and 6 of Plaintiffs' Fifth Cause of Action and therefore deny the same.

SIXTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. In response to Paragraph 2, Defendants admit that in 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. 476-477, however Defendants deny each and every other allegation contained in Paragraph 2 of Plaintiffs' Sixth Cause of Action. Defendants state affirmatively that the Act recognized the Tribe's power of taxation by including "all powers vested in any Indian tribe or tribal council by existing law . . ." Plaintiffs' allegation that the only powers reserved were those which had been "exercised" by the Tribe is unfounded.

3. Defendants deny each and every allegation contained in Paragraph 3 of Plaintiffs' Sixth Cause of Action.

SEVENTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants admit the allegations of Paragraphs 2 and 3 of Plaintiffs' Seventh Cause of Action.

3. Defendants deny each and every allegation contained in Paragraphs 4 and 5 of Plaintiffs' Seventh Cause of Action. Defendants state affirmatively that the tax is not discriminatory because the only exemption is for Tribal use as a governmental function. All other gas leaves the Reservation and is subject to

the tax, even that gas which is sold and returns for individual or business consumption on the Reservation.

EIGHTH CAUSE OF ACTION

1. In response to Paragraph 1, Defendants incorporate by reference their Answer to Plaintiffs' paragraphs 1 through 31 of the First Cause of Action.

2. Defendants admit that 28 U.S.C. § 2201 *et seq.* provides for a Declaratory Judgment.

3. Defendants deny each and every allegation contained in Paragraph 3 of Plaintiffs' Eighth Cause of Action.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of laches. By waiting until fifteen days before the effective date of the tax to serve Defendants with Summons and Complaint after having notice of the tax for over three months, Plaintiffs are guilty of an "inexcusable delay in asserting a right." Hoehn v. Crews, (CCA Okla.) 144 F.2d 665, 671, cert denied, 65 S. Ct. 132, 323 U.S. 773, 89 L.Ed. 618 (1944).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of clean hands in that Plaintiffs have not paid royalties to the Defendants in a timely manner; Plaintiffs have not employed or trained Tribal members in their operation on the Reservation; Plaintiffs have not properly accounted to Defendants for royalties on gas and liquid hydrocarbon substances; and Plaintiffs have in some cases not fully reported production, all in contravention of the terms of their leases.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint with prejudice and award Defendants' attorneys' fees, costs, interest and such other and further relief as is just and proper.

Respectfully submitted,
NORDHAUS, MOSES & DUNN

By TERRY D. FARMER

Terry D. Farmer
800 American Bank of
Commerce Complex
200 Lomas Boulevard NW
Albuquerque, New Mexico
87102
(505) 843-9440
Attorneys for Defendants
Jicarilla Apache Tribe

This is to certify that a copy of the foregoing Answer was mailed to all opposing counsel on this 5th day of July, 1977.

TERRY D. FARMER

ANSWER,
JICARILLA APACHE TRIBE, ET AL.,
CASE NO. 77-343-P. (AMOCO)

PREVIOUS PAGE WAS BLANK

[Caption, Civil No. 77-343-P Omitted in Printing]

ANSWER
(Filed July 21, 1977)

COMES NOW the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, by their attorneys Nordhaus, Moses and Dunn, and for their answer to Plaintiffs' Complaint state:

COUNT I

1. Defendants are without sufficient information to form a belief as to the truth of the allegations contained in paragraphs 1 and 2 and therefore deny the same.

2. These Defendants admit the allegations in paragraph 3.

3. In response to paragraph 4, these Defendants admit that the legislative powers of the Jicarilla Apache Tribe reside in the Jicarilla Apache Tribal Council, and that Gwendolyn Velarde is Treasurer of the Jicarilla Apache Tribe, but deny that Gwendolyn Velarde is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax.

4. These Defendants admit the allegations of paragraph 5.

5. In response to paragraph 6 these Defendants are without sufficient information to form a belief as to the truth of the allegations and therefore deny the same.

6. These Defendants admit the allegations of paragraph 7.

7. In response to paragraph 8, these Defendants admit that federal question jurisdiction is conferred on this Court by 28 U.S.C. § 1331, but only because the Tribe has waived its immunity from suit in the Oil and Gas Severance Tax Ordinance No. 77-0-02 as amended by Ordinance No. 77-0-195. These Defendants deny each and every other allegation of paragraph 8.

8. In response to paragraph 9, these Defendants admit that the leases were granted by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. § 398, but deny that said leases were issued pursuant to 25 U.S.C. § 396.

9. These Defendants admit the allegations of paragraph 10.

10. In response to paragraph 11, Defendants admit that the Tribe adopted a Revised Constitution, including provisions for taxation, but Defendants deny that they acted without lawful authority or procedure or that such Constitution was adopted on or about November 22, 1968. Defendants state affirmatively that the Revised Constitution of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968, and duly approved by the Undersecretary of the Interior on February 13, 1969.

11. In response to paragraph 12, Defendants admit that the Revised Constitution adopted by the Tribe on December 23, 1968, was approved by Russell E. Train, acting Undersecretary of the Interior on or about February 13, 1969, but Defendants deny that his approval was without due consideration. Defendants state affirmatively that no hearing is required by law prior to the Secretary or his delegated representative's approval of a Tribal Constitution.

12. In response to paragraph 13, Defendants admit that the Tribal Council on or about July 9, 1976, adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195, (Exhibit "B" to the Complaint) but Defendants deny that the Tribal Council acted without lawful authority. Defendants state affirmatively that the Tribal Council acted with full constitutional authority when adopting said Ordinance.

13. In response to paragraph 14, Defendants admit that the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the Secretary of the Interior of the United States on or about December 23, 1976, but Defendants deny that the Secretary acted without due consideration. Defendants state affirmatively

that no hearing is required by law prior to the approval by the Secretary, or his delegated representative, of a Tribal Council ordinance.

14. Defendants admit the allegations contained in paragraph 15 of Plaintiffs' Complaint.

15. Defendants deny each and every allegation contained in paragraphs 16, 17 and 18 of Plaintiffs' Complaint.

COUNT II

1. In response to paragraph 1, these Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, these Defendants admit that the Jicarilla Oil and Gas Severance Tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" but deny that said tax is discriminatory as to Plaintiffs or that such tax denies Plaintiffs the equal protection of law. Defendants state affirmatively that the Defendant Tribal Council only has authority over activities within the boundaries of the Jicarilla Apache Reservation and therefore cannot tax production outside its jurisdiction.

3. In response to paragraph 3, these Defendants admit that the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax Ordinance, but deny that Plaintiffs were denied equality of law guaranteed them by the Fifth Amendment to the United States Constitution. Defendants state affirmatively that the Fifth Amendment to the United States Constitution does not apply to Indian tribes and therefore Plaintiffs failed to state a claim upon which relief can be granted.

4. Defendants deny each and every allegation contained in paragraph 4 of Count II. Defendants state affirmatively that Plaintiffs were not denied equal protection under the Indian Civil Rights Act, 25 U.S.C. § 1302 or Article II, § 18 of the New Mexico Constitution because the tax is not discriminatory

between producers or purchasers of natural gas and oil doing business on the Reservation.

COUNT III

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraph 2.

3. Defendant deny each and every allegation contained in paragraphs 3 and 4 of Count III.

COUNT IV

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants deny each and every allegation contained in paragraphs 2, 3 and 4 of Count IV. Defendants state affirmatively that Plaintiffs have failed to set forth any reasons why the Secretary's approval of the tax was arbitrary, capricious and not in accordance with law. Therefore, Plaintiffs fail to state a claim upon which relief can be granted.

COUNT V

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants deny each and every allegation contained in paragraphs 2, 5 and 7 of Plaintiffs' Count V. Defendants state affirmatively that 25 U.S.C. § 398(c) does not specifically preempt taxation by the Tribe in favor of the State of New Mexico, and such preemption cannot be read into the statute by implication. There is no statute which "requires" the State to impose a severance tax to fund state governmental services to the Tribe and in fact, the State provides only limited services to the

Tribe and its members. By the terms of the Indian Reorganization Act, the Tribe has Congressional authorization to tax. The Tribe's severance tax does not conflict with the taxes levied by the State of New Mexico. Nor is the severance tax contrary to the Commerce Clause of the United States Constitution as is shown elsewhere herein.

3. Defendants are without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraphs 3, 4 and 6 of Count V and therefore deny the same.

COUNT VI

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, Defendants admit that in 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. § 476-477, however, Defendants deny each and every other allegation contained in paragraph 2 of Plaintiffs' Count VI. Defendants state affirmatively that the Act recognized the Tribe's power of taxation by including "all powers vested in any Indian Tribe or Tribal Council by existing law . . . ." Plaintiffs' allegation that the only powers reserved were those which had been "exercised" by the Tribe is unfounded.

3. Defendants deny each and every allegation contained in paragraph 3 of Count VI.

COUNT VII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraphs 2 and 3 of Count VII.

3. Defendants deny each and every allegation contained in paragraphs 4 and 5 of Count VII. Defendants state affirmatively

that the tax is not discriminatory because the only exemption is for Tribal use as a governmental function. All other gas leaves the Reservation and is subject to the tax, even that gas which is sold and returns for individual or business consumption on the Reservation.

COUNT VIII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit the allegations of paragraphs 2 and 3 but deny that a Revised Constitution of the Tribe was adopted on or about November 22, 1968. Defendants state affirmatively that the Revised Constitution of the Jicarilla Apache Tribe was duly adopted by the Tribe on December 23, 1968, and duly approved by the Undersecretary of the Interior on February 13, 1969.

3. In response to paragraph 4, Defendants are without sufficient information to form a belief as to the truth of the allegations therein and therefore deny the same.

4. Defendants deny each and every allegation of paragraph 5. Defendants state affirmatively that 25 U.S.C. §398(c) does not specifically grant states the exclusive right to levy taxes and such an exclusive right cannot be read into the statute by implication. Defendants state that the statute does not constitute a limitation upon the right or power of the Tribe to levy and collect taxes and no such limitation can be read into the statute by implication.

5. Defendants deny each and every allegation of paragraph 6. Defendants state affirmatively that the Jicarilla Oil and Gas Severance Tax is not contrary to the Amended Charter and Revised Constitution of the Tribe because there are no restrictions or limitations on the Tribe's sovereign taxing power imposed by the Constitution of the United States, any applicable

Federal statute or any regulation of the Department of the Interior.

6. Defendants deny each and every allegation of paragraph 7.

COUNT IX

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraph 2, Defendants state that the allegations therein constitute a legal conclusion which requires no answer. In the alternative, Defendants deny each and every allegation of paragraph 2.

3. In response to paragraph 3, Defendants state that the allegations therein set forth a legal conclusion for which no answer is required. In the alternative, Defendants admit that they consented to the presence of Plaintiffs on the Reservation for the exploration and development of oil and gas leases, but deny that they consented to the presence of Plaintiffs on the Reservation for any other purpose.

4. Defendants deny each and every allegation of paragraph 4. Defendants affirmatively state that Plaintiffs have failed to set forth in Count IX how they were denied any rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. §1302. Therefore, Plaintiffs failed to state a claim upon which relief can be granted.

COUNT X

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit that 28 U.S.C. §2201 *et seq.* provides for a declaratory judgment.

3. Defendants deny each and every allegation contained in paragraph 3 of Count X.

COUNT XI

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. In response to paragraphs 2, 3, 4 and 5, Defendants state that the allegations therein constitute legal conclusions for which no response is necessary. In the alternative, Defendants deny each and every allegation of paragraphs 2, 3, 4 and 5. Defendants state affirmatively that the oil and gas severance taxes of the Tribe and the State of New Mexico are not mutually exclusive. Defendants further state that if such taxes are mutually exclusive, the taxes levied by the State of New Mexico are invalid because the State of New Mexico has no right or power either under the New Mexico Enabling Act, 36 Stat. 557, 558-559 (1910) or the New Mexico Constitution to tax oil and gas production from the Jicarilla Apache Reservation.

COUNT XII

1. In response to paragraph 1, Defendants incorporate by reference their answer to Plaintiffs' paragraphs 1 through 18 of Count I.

2. Defendants admit that Plaintiffs produce oil and gas from the Jicarilla Reservation and that the majority of such production is gas, but are without sufficient information to form a belief as to the truth of the remaining allegations contained in paragraph 2 and therefore deny the same.

3. In response to paragraph 3, Defendants state that the allegations therein are argumentative and therefore Defendants are not required to respond. In the alternative, Defendants are without sufficient information to form a belief as to the truth of the allegations therein and therefore deny the same.

4. In response to paragraph 4, Defendants state that the allegations therein are argumentative and therefore Defendants are not required to reply. In the alternative, Defendants deny each and every allegation of paragraph 4. Defendants state affirmatively that they have voluntarily waived immunity from suit for the purpose of determining the validity of this tax and that should the tax be held invalid, any monies paid to the Tribe would be refunded. Sections 11 and 12 of the Jicarilla Oil and Gas Severance Tax are only applicable to payments which are erroneously, not illegally, paid. Consequently full refund procedures are available and no injunctive relief should be granted.

5. In response to paragraph 5, Defendants state that the allegations therein are argumentative and that no response is required.

6. Defendants deny each and every allegation of paragraph 6. Defendants affirmatively state that no injunctive relief should be granted against these Defendants because no irreparable loss is possible. Defendants further state that Plaintiffs' arguments are without substance because the refund procedures for the Jicarilla Oil and Gas Severance Tax and the taxes by the State of New Mexico are exactly the same, yet Plaintiffs have not sought injunctive relief against the State of New Mexico.

7. These Defendants are without sufficient information to form a belief as to the truth of the allegations contained in paragraph 7 and therefore deny the same.

8. Defendants deny each and every allegation of paragraph 8. Defendants affirmatively state that there is nothing uncommon or illegal about double or multiple tax liability on a single transaction.

9. Defendants deny each and every allegation of paragraph 9. Defendants affirmatively state that Plaintiffs would not be compelled to make double payments in connection with a single

liability because there would be a single liability to the Tribe and a single liability to the State with a single payment on each.

10. Defendants deny each and every allegation of paragraph 10. Defendants affirmatively state that they should not be required to interplead their claim for taxes with the State of New Mexico because the taxes are not mutually exclusive.

11. In response to paragraph 11, Defendants state that the allegations therein are argumentative and therefore do not require an answer. Defendants affirmatively state that for Plaintiffs to pay into Court only the State taxes which may be due is inequitable without also paying into Court the Jicarilla Oil and Gas Severance Tax which may be due.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of Laches because, after having notice of the tax for over three months, Plaintiffs waited until the date the tax was due to file this action and therefore are guilty of an "inexcusable delay in asserting a right." *Hoehn v. Crews*, (CCA Okla.) 144 F.2d 665, 671, *cert denied*, 65 S. Ct. 132, 323 U.S. 773, 89 L.Ed. 618 (1944).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrine of unclean hands in that Plaintiffs have violated the terms of their leases by failing to employ or train Tribal members in Plaintiffs' operations on the Reservation, failed to properly to account to Defendants for royalties on gas and liquid hydrocarbons substances, failed to pay royalties in a timely manner, and in some cases not fully reported production.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint with prejudice and award Defendants attorneys'

fees, costs, interest and such other and further relief as is just and proper.

Respectfully submitted,
NORDHAUS, MOSES &
DUNN

By TERRY D. FARMER

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87102
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This is to certify that a copy of the attached Answer was mailed to all opposing counsel on this 21st day of July, 1977.

TERRY D. FARMER

Note: The Complaint in Intervention of Mobil Oil Corporation and Oxy Petroleum Inc., and Answer thereto are essentially the same as the other pleadings in Case No. 76-292-P, Merrion, et al., v. Jicarilla Apache Tribe, and are therefore omitted from this Appendix.

ORDER TO CONSOLIDATE CASES 77-292-P,
CIVIL, AND 77-343-P, CIVIL

[Consolidated Caption Omitted in Printing]

ORDER TO CONSOLIDATE
(Filed August 3, 1977)

THIS MATTER having arisen sua sponte and the Court finding that good cause exists to consolidate these matters for trial, it is now, hereby

ORDERED, ADJUDGED AND DECREED that these cases be and they hereby are consolidated.

. . . . . .
THE HONORABLE
H. VEARLE PAYNE
U. S. District Court Judge

PRE-TRIAL ORDER
IN CONSOLIDATED CASES

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PRE-TRIAL ORDER

(Filed August 19, 1977)

This matter having come before the Court on August 5, 1977, at pretrial conference held before The Honorable H. Vearle Payne, United States District Judge, pursuant to Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.; and Jack M. Campbell, Esq. and Jason W. Kellahin, Esq. having appeared as counsel for Plaintiffs Merrion and Bayless, et al., and John R. Cooney, Esq. and Mark B. Thompson, III, Esq. having appeared as counsel for Plaintiffs Amoco and Marathon and Terry D. Farmer, Esq. and Robert J. Nordhaus, Esq. having appeared as counsel for Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council and Defendant Velarde in No. 77-343-P, and James B. Grant, Esq. having appeared as counsel for Defendant Cecil Andrus, Secretrary of the Interior and Albert L. Pitts, Esq., Assistant Attorney General, having appeared as counsel for Defendant Martinez in No. 77-343-P; the following action was taken:

1. **JURISDICTION AND PARTIES:** No. 77-292-P and Counts I through X of No. 77-343-P are actions for a permanent injunction against Defendants prohibiting Defendants from taking any action whatsoever to enforce or facilitate the collection of the Jicarilla Oil and Gas Severance Tax imposed by Jicarilla Tribal Council Ordinance No. 77-0-02 as amended and for an order declaring that Plaintiffs are in no way liable for any amount alleged to be due under the Jicarilla Oil and Gas Severance Tax, that the Tribal Council was without legal authority to issue such ordinance, that if the Secretary of the Interior has approved this amended ordinance, such approval was unlawful and unconstitutional, and that the ordinance is void and of no effect. The jurisdiction of the Court is invoked under Article I, Section 8, Clause 3 of the United States Constitution; the Fifth

Amendment to the United States Constitution, and 5 U.S.C. Sec. 706. The Jicarilla Apache Tribe, pursuant to resolution of the Jicarilla Apache Tribal Council, waives any claim to sovereign immunity for the determination of the legal validity of this tax. The jurisdiction of the Court to determine validity of approval of the Jicarilla Tribal Council Ordinance No. 77-0-02 as amended is questioned by the Secretary of the Interior. There is no remaining question as to the propriety of the parties in No. 77-292-P and Counts I through X of 77-343-P.

Counts XI and XII of No. 77-343-P are an action for declaratory judgment against the Defendant Martinez for a determination that if the Jicarilla Oil and Gas Severance Tax is held to be valid and applicable to Plaintiffs, then the state taxes described in the Complaint are invalid and the Defendant Martinez is without authority to enforce and collect such taxes, and for interpleader to order the Defendant Martinez and the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde and Cecil Andrus to interplead their claims for taxes due or alleged to be due upon severance of oil or gas by Plaintiffs from lands within the Executive Order Reservation of the tribe. Jurisdiction is invoked under Article I, Section 8, Clause 3 of the United States Constitution; Article II, Section 2 of the United States Constitution; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; 25 U.S.C. §§476 and 477; 25 U.S.C. §1301, *et seq.;* 25 U.S.C. §398(c); 42 U.S.C. §1983; and 5 U.S.C. §706.

2. GENERAL NATURE OF THE CLAIMS OF THE PARTIES:

(a) Plaintiffs Merrion and Bayless, et al., Plaintiffs in Cause No. 77-292-P CIV, claim:

(1) The Defendants have deprived Plaintiffs of the due process of law by imposing and/or approving such a discriminatory tax without notice to or the opportunity for hearing by the Plaintiffs.

(2) In enacting, adopting, approving and/or implementing the Jicarilla Oil and Gas Severance Tax the Defendants denied the Plaintiffs the equal protection of law guaranteed them by the Fifth Amendment to the United States Constitution and by the Indian Civil Rights Act, 25 U.S.C. Sec. 1302, and by Article II, Section 18, of the New Mexico Constitution.

(3) The Secretary of the Interior contractually promised in the leases that he would approve no regulation effecting a change in the rate of royalty. If he approved the Jicarilla Severance Tax the Secretary of the Interior breached the express provisions of Plaintiffs' leases.

(4) If the Secretary of the Interior approved the Jicarilla Oil and Gas Severance Tax such approval was arbitrary, capricious, not in accordance with law, contrary to constitutional right, in excess of his statutory jurisdiction, and in breach of his express contractual promises to the Plaintiffs without observance of the procedure required, all in violation of the Administrative Procedure Act, 5 U.S.C. Sec. 701.

(5) In 25 U.S.C. Sec. 398 and 398(c) Congress gave the various states the exclusive right, power and authority to levy taxes upon the output of oil and gas wells upon all lands within Executive Order Indian reservations. The Jicarilla Apache reservation is an Executive Order Indian reservation and thus the Jicarilla Oil and Gas Severance Tax is expressly preempted by 25 U.S.C. Sec. 398 and 398(c).

(6) In 1934 Congress enacted the Indian Reorganization Act, 25 U.S.C. Sec. 476-477. The Jicarilla Apache Tribe is organized and incorporated under the Indian Reorganization Act. In the Indian Reorganization Act Congress expressly enumerated the powers which an Indian tribe choosing to be incorporated under that Act could exercise. The power of taxation was not enumerated in the Indian

Reorganization Act and is therefore denied a tribe such as the Jicarilla Apache Tribe which had not exercised such power prior to the adoption of the Indian Reorganization Act.

(7) The Jicarilla Severance Tax applies only to oil and gas produced on the Jicarilla Apache reservation and sold or transported off the reservation. By exempting gas which is consumed on the Jicarilla Apache Reservation the Jicarilla Severance Tax unfairly discriminates against interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

(8) The Secretary of the Interior did not personally expressly approve the Jicarilla Oil and Gas Severance Tax as is expressly required by the 1968 Revised Constitution of the Jicarilla Apache Tribe.

(9) The failure of the official area director of the Bureau of Indian Affairs to approve the Jicarilla Oil and Gas Severance Tax violates federal regulations.

(b) Plaintiffs Amoco Production Company (Amoco) and Marathon Oil Company (Marathon), Plaintiffs in No. 77-343-P, claim:

(1) The first seven counts of the Complaint in No. 77-343-P seek the same relief and make the same claims against the Defendants Jicarilla Apache Tribe and Cecil Andrus, Secretary of the Interior, as the first seven causes of action in No. 77-292-P.

(2) In addition Amoco and Marathon make their claims concerning the validity of the Jicarilla Oil and Gas Severance Tax against Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe. Amoco and Marathon claim that Defendant Velarde is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax and is without power or authority to enforce or collect such tax by reason of the invalidity of the tax.

(3) In addition Amoco and Marathon claim that the Jicarilla Oil and Gas Severance Tax is illegal for the following three additional reasons not claimed in the Complaint in No. 77-292-P:

a. Adoption and enactment of the Jicarilla Oil and Gas Severance Tax is contrary to the Amended Charter and Revised Constitution of the Jicarilla Apache Tribe.

b. The right or power, if any, of the Jicarilla Apache Tribe to levy and collect taxes may be exercised only to exclude non-members from the Reservation. By consenting to the issuance of oil and gas leases to Amoco and Marathon, the Tribe has consented to their presence on the Reservation. Any attempt to levy and collect additional taxes denies Amoco and Marathon rights guaranteed them by the Indian Civil Rights Act, 25 U.S.C. Sec. 1302.

c. The Secretary of the Interior did not approve enactment of the Jicarilla Oil and Gas Severance Tax.

(4) In addition, Amoco and Marathon claim as against the Defendant Tony Martinez, Executive Director, New Mexico Oil and Gas Accounting Commission, that such Defendant is responsible for the enforcement and collection of various taxes levied by the State of New Mexico upon production of oil or gas by Amoco and Marathon from leases held by them upon lands within the Jicarilla Apache Reservation. Amoco and Marathon seek a declaratory judgment that if the Jicarilla Oil and Gas Severance Tax is held to be valid, notwithstanding 25 U.S.C. Sec. 398(c), the state taxes levied and collected by the Defendant Martinez are invalid and Defendant Martinez is without power or authority to collect the same, for one or more of the following reasons:

a. If the Jicarilla Apache Tribe is authorized to levy and collect taxes upon the severance of oil or gas from leases within the Jicarilla Apache Reservation notwithstanding 25 U.S.C. Sec. 398(c), then 25 U.S.C. Sec. 398(c) does not permit Defendant Martinez to levy and collect taxes upon such production and Defendant Martinez is otherwise without authority to levy and collect such taxes.

b. The state taxes described above constitute an unconstitutional burden upon interstate commerce in that

such taxes create a risk of multiple taxation upon interstate commerce.

(5) In addition Amoco and Marathon claim that because the Jicarilla Oil and Gas Severance Tax and the state taxes described above seek to tax the same activity, the claims of the Tribe and the Defendant Martinez are such that Amoco and Marathon are or may be exposed to double or multiple liability, Plaintiffs may be compelled to make double payments in connection with a single liability, and, therefore, the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Velarde and Martinez should be required to interplead their claims for such taxes. The claims of Amoco and Marathon for declaratory judgment against the Defendant Martinez and for interpleader will not be tried in the hearing commencing August 29, 1977 but will be reserved for later determination.

(c) Defendant Cecil Andrus, Secretary of the Interior, claims:

That this Court is without jurisdiction to entertain this action against the Secretary;

That the severance tax ordinance enacted by the Jicarilla Apache Tribe is within its governmental authority and does not derive from Congressional authorization;

That the Secretary's action, under properly delegated authority, is not reviewable as timely appeal was not taken as prescribed by 25 C.F.R. 2.10, and

That this controversy is not justiciable by reason of the Tribe's sovereign immunity.

(d) Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council claim:

1. Plaintiffs have not been deprived of due process of law as the result of approval of the Severance Tax Ordinance and/or imposition of the severance tax by the Tribe without notice or the opportunity to be heard. The Plaintiffs do not have the right to notice or hearing prior to enactment of legislation by the Tribal Council; further, the Tribal Council meetings discussing and approving said tax

were public meetings, at which the Plaintiffs had the opportunity to be heard.

2. The Fifth Amendment of the United States Constitution and Article II, Section 18, of the New Mexico Constitution do not apply to Indian Tribes, therefore Plaintiffs were not denied the equal protection of law guaranteed by said Fifth Amendment. Furthermore, Defendants did not deny Plaintiffs the equal protection of law guaranteed them by the Indian Civil Rights Act, 25 U.S.C., 1302.

3. The Tribal severance tax is not a royalty, therefore the approvals of the severance tax by the Tribe and the Secretary of Interior do not change the royalty rate.

4. The Secretary of Interior is not required by law to notify Plaintiffs or grant Plaintiffs a hearing prior to approval of Tribal Ordinances, including the Tribal severance tax ordinance; therefore, the Secretary of Interior did not violate the Administrative Procedure Act, 5 U.S.C. 702, in approving the Tribal severance tax ordinance.

5. 25 U.S.C., Section 398 and 398(c) grants to states and local authority the right to levy taxes on the output of oil and gas wells on lands within Executive Order Indian Reservations. The authority of the state to tax the output of oil and gas wells is not exclusive of the right of the Tribe to levy its severance tax.

6. The power to tax is an inherent attribute of the tribal sovereignty of the Jicarilla Apache Tribe which is not limited in any way by the Indian Reorganization Act, 25 U.S.C., Sections 476-477.

7. The Jicarilla Apache severance tax applies to all oil and gas produced and sold or transported off the Reservation. All of the oil and gas produced on the Jicarilla Apache Reservation except that used for drilling and production activities is sold or transported off the Reservation. There is no discrimination against interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution because there is no exempt oil or gas produced. Furthermore, the only exemption provided by the Ordinance is the exemption of royalty gas, oil or condensate

taken by the Tribe in kind, and used by the Tribal Government.

8. The approval of the Acting Area Director, Albuquerque Area Office, Bureau of Indian Affairs, of the Jicarilla Oil and Gas Severance Tax Ordinance, constituted approval of the tax by the Secretary of Interior, and was consistent with law and federal regulations. Furthermore, the said severance tax ordinance of the Tribe became legally effective without approval of the Secretary of the Interior or his authorized delegate as provided by Article XI, Section 2, of the Tribal Constitution.

9. Adoption and enactment of the Jicarilla Apache Oil and Gas Severance Tax is consistent with the Tribe's sovereign taxing power, the Charter of 1937, the Constitution of 1937, the Constitution of 1960 and the Revised Constitution of 1968 of the Jicarilla Apache Tribe which specifically grants to the Tribe the power to impose taxes upon non-Indians doing business on the Reservation.

10. The State of New Mexico is without power or authority to levy and collect taxes on oil and gas production on the Jicarilla Apache Reservation by reason of the disclaimers contained in the Enabling Act for New Mexico, 36 Stat. 557, Section 2, and the Constitution of New Mexico, Article XXI, Section 2, and Section 10.

11. The Jicarilla Apache Severance Tax together with the state taxes on oil and gas production if valid, do not constitute such a burden upon commerce as to render either or both of those taxes unconstitutional. Said taxes are separate and do not constitute a single liability, therefore there is no basis for interpleader of the state and Tribal claims.

12. The Jicarilla Apache Oil and Gas Severance Tax, if passed on in whole or in part to the consumer of oil or gas, will result in a minimal increase in the consumer's price of oil or gas, if any. If the tax is absorbed by Plaintiffs, it will constitute a minimal burden on Plaintiffs. The ratio of the Jicarilla Apache Severance Tax to the interstate price of old oil or old gas and the ratio of the combined state and

Jicarilla tax on the interstate price of old oil or gas is irrelevant to the issues of this suit.

13. The 1968 Revised Constitution of the Jicarilla Apache Tribe was duly adopted and approved pursuant to law.

14. Even if there is no other similar tax levied on other federal lands over which the Tribe has no authority, Plaintiffs were not denied the equal protection of law.

(e) Defendant Tony Martinez, Defendant in No. 77-343P claims:

(1) This Court lacks jurisdiction by virtue of 28 U.S.C. §1341 to grant declaratory relief with respect to the validity of the various taxes imposed by the State of New Mexico as specified in the Complaint in No. 77-343P or with respect to the power and authority of Defendant Martinez to collect such cases.

(2) There is no justiciable controversy between the Plaintiffs and Defendant Martinez.

(3) The Complaint fails to state a claim for which relief may be granted against Defendant Martinez.

(4) The right is reserved to raise other claims and defenses at the time an Answer or other responsive pleading is due from Defendant Martinez.

3. UNCONTROVERTED FACTS: The following facts are established by admission in the pleadings or by stipulations of counsel at the pretrial conference:

(a) That the Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §476-477, residing on an Executive Order Indian reservation within the State of New Mexico;

(b) That the legislative powers of the Tribe reside in the Tribal Council;

(c) That Defendant Cecil Andrus is the Secretary of the Interior of the United States of America;

(c) That the amount in controversy exceeds $10,000.00 exclusive of interest and costs;

(e) That federal question jurisdiction is conferred on this Court by 28 U.S.C. §1331;

(f) That the Tribe is the beneficial owner of royalty interests created by oil and gas leases approved by the Secretary of the Interior pursuant to 25 U.S.C. §398 and 25 U.S.C. §396;

(g) That the question of the Revised Constitution was approved by Russell Train, Undersecretary of the Interior;

(h) That the Defendant Jicarilla Apache Tribal Council adopted Ordinance No. 77-0-02, as amended by Ordinance No. 77-0-195;

(i) That copies of the Ordinance with instructions on its applicability and procedural requirements were served upon each of the Plaintiffs;

(j) That the Jicarilla Oil and Gas Severance Tax applies only to oil and gas produced on the Jicarilla Apache Reservation;

(k) That the Jicarilla Tribal Oil and Gas Severance Tax, Title 4, provides for an exemption from taxation for royalty oil, gas or condensate taken by the Tribe in kind and used by the Tribe;

(l) That the Tribe directed Plaintiffs that the Tax should be paid on gas, crude oil and condensate produced on the Reservation and sold or transported off the Reservation.

Stipulated Facts

(a) That Plaintiffs are individuals doing business or corporations duly authorized to do business within the State of New Mexico;

(b) That the lease numbers and property descriptions contained in Amended Exhibit "A" are correct;

(c) That the State of New Mexico imposes and collects the following taxes as measured by oil and gas production: Oil and Gas Emergency School Tax, the Oil and Gas Conservation Tax, the Oil and Gas Production Equipment Ad Valorem Tax, the Oil and Gas Severance Tax and the Natural Gas Processors Tax.

4. CONTESTED ISSUES OF FACT: The contested issues of fact remaining for decision are:

(a) That the leases which are the basis of this case are between the proper parties and approved by the proper governmental authorities;

(b) Whether the Jicarilla Oil and Gas Severance Tax was approved by the Secretary of the Interior of the United States;

(c) Whether Plaintiffs or their customers will be irreparably harmed by having to pay such tax;

(d) Whether the tax imposed upon Plaintiffs is discriminatory;

(e) Whether the State of New Mexico received $636,391.00 from gas severance taxes on gas produced from the Jicarilla Apache Reservation in 1976, and whether a substantially higher figure will be received in 1977.

(f) Whether the State is required to impose the above taxes in order to provide governmental services to the Jicarilla Apache Reservation;

(g) Whether the Jicarilla Oil and Gas Severance Tax amounts to at least 12% of the interstate price of old gas;

(h) Whether the Jicarilla Oil and Gas Severance Tax Ordinance was approved by the authorized delegate of the Secretary of the Interior of the United States;

(i) Whether the Jicarilla Oil and Gas Severance Tax with the New Mexico Severance Tax, creates a combined tax burden of at least 29% of the interstate price of old gas;

(j) Whether any or all of the total tax may be passed on to the ultimate gas consumer;

(k) Whether the Jicarilla Oil and Gas Severance Tax is without congressional authorization.

5. CONTESTED ISSUES OF LAW: There are no special issues of law reserved other than those implicit in the foregoing issues of fact and contentions of the parties.

6. EXHIBITS: There are identified and offered the following:

(a) Plaintiffs Merrion and Bayless, et al., Plaintiffs in Cause No. 77-292 P CIV, Exhibits:

(1) List of all Plaintiffs' leases with Jicarillas together with property descriptions of each as stipulated to;

(2) Jicarilla Apache Tribal Ordinance of the Tribal Council 77-0-02, as amended by Ordiance No. 77-0-195;

(3) Instructions to all oil and gas lessees, operators and purchasing companies doing business on the Jicarilla Apache Reservation;

(4) Remittance forms filed by all Plaintiffs showing tax which would have been imposed for April, May and June, 1977;

(5) Revised Jicarilla Tribal Constitution, 1968;

(6) Gas and oil sales contracts;

(7) Possibly an economic impact study.

(b) Plaintiffs Amoco and Marathon, Plaintiffs in No. 77-343 P CIV. Exhibits:

(1) List of Amoco Leases within Jicarilla Apache Reservation showing production of oil and gas during 1976 and 1977;

(2) List of Marathon Leases within Jicarilla Apache Reservation showing production of oil and gas during 1976 and 1977;

(3) Copy of letter and acknowledgment of receipt of payment under protest of state taxes by Amoco for April, 1977;

(4) Copy of letter and acknowledgment of receipt of payment under protest of states taxes by Amoco for May, 1977;

(5) Copy of letter and acknowledgment of receipt of payment under the protest of state taxes by Marathon for April, 1977;

(6) Copy of letter and acknowledgment of receipt of payment under protest of state taxes by Marathon for May, 1977;

(7) Copy of Executive Orders pertaining to Jicarilla Apache Reservation;

(8) Operator's Remittance Report for Jicarilla tax for Amoco for April, 1977;

(9) Operator's Remittance Report for Jicarilla tax for Amoco for May, 1977;

(10) Operator's Remittance Report for Jicarilla tax for Marathon for April, 1977;

(11) Operator's Remittance Report for Jicarilla tax for Marathon for May, 1977.

(c) Defendants Jicarilla Apache Tribe and Jicarilla Apache Tribal Council's Exhibits:

(1) Dr. Alfred Parker's economic impact study;

(2) Exhibit regarding governmental services;

(3) Exhibit regarding legislative history of 25 U.S.C. §398(c);

(4) Peat, Marwick & Mitchell's accounting procedures.

(5) Exhibit regarding taxes paid to the State of New Mexico on oil and gas production from the Jicarilla Apache Reservation.

(6) Exhibit regarding authority of Undersecretary Russell E. Train to approve Jicarilla Apache Tribe's Constitution.

(7) Exhibit regarding authority of Loyd Nicholson to approve Jicarilla Apache Tribe's Severance Tax Ordinance.

(8) Exhibits admitted during the hearing on preliminary injunction.

(d) Defendant Cecil Andrus' Exhibits:

(e) Each party will mark his own exhibits and make a list thereof. Lists of exhibits will be furnished to all opposing counsel and the Court at least 10 days prior to trial. At that time all

exhibits will be made available for examination by opposing counsel. This rule does not apply to rebuttal exhibits which cannot be anticipated.

(f) Any counsel requiring authentication of an exhibit must so notify the counsel who proposes to offer the exhibit at least 5 days prior to trial.

7. DISCOVERY: Discovery is to be completed by August 22, 1977.

8. WITNESSES:

(a) In the absence of reasonable notice to opposing counsel to the contrary, Plaintiffs Merrion and Bayless, et al., will call or will have available at the trial:

(1) Thomas Dugan;

(2) Gregory Merrion or Robert L. Bayless;

(3) C. E. Lamb;

(4) George Deeter;

(5) R. A. Loosley;

(6) William S. Jameson;

(7) Royce McCary or another representative of Chase Oil;

Plaintiff Merrion and Bayless, et al., may call:

(1) Joseph A. Herrera;

(2) A witness from the New Mexico Oil and Gas Accounting Commission;

(3) A witness from Sherman H. Clark and Associates.

(b) In the absence of reasonable notice to opposing counsel to the contrary, Plaintiff Amoco and Marathon may call:

(1) Jack Blanscet;

(2) R. E. McCleskey.

(c) In the absence of reasonable notice to opposing counsel to the contrary, Defendants Jicarilla Apache Tribe and Jicarilla

Apache Tribal Council will call, or may have available at the trial:

(1) Dale Vigil;

(2) Richard Tecube;

(3) Dr. Alfred Parker;

(4) Nina Zintz;

(5) Espeedie Ruiz;

(6) Ronald Esquerra;

(7) Lloyd Nickelson;

(8) Ray Butler, Commissioner of Indian Affairs;

(9) Russell E. Train;

(10) Jim Follingstad

(d) In the absence of reasonable notice to opposing counsel to the contrary, Defendant Cecil Andrus, will call, or will have available at the trial:

Ray Butler, Acting Commissioner of Indian Affairs

Patrick Wehling, Realty Officer, Albuquerque Area

10. AMENDMENTS TO PLEADINGS: There are no amendments to the pleadings contemplated.

11. OTHER MATTERS: The following additional matters to aid in the disposition of the action were determined: Judge McCoy is assigned to determine all pretrial disputes.

12. MODIFICATIONS — INTERPRETATION: This pretrial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing by the Court. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this order,

reference may be made to the record of this conference to the extent reported by stenographic notes, and to the pleadings.

13. TRIAL SETTING: The case was set for trial without a jury on August 29, 1977 at 9:30 A.M. The trial commencing on August 29 will include only the claims of Plaintiffs against the Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde and Cecil Andrus, Secretary of the Interior concerning the validity of the Jicarilla Oil and Gas Severance Tax. The claims of Plaintiffs Amoco and Marathon in No. 77-343 P for declaratory judgment against the Defendant Martinez and interpleader will be reserved for later determination. The Defendant Martinez has been notified of the trial commencing August 29, 1977 and may appear at such trial if he desires to assert any claims he might desire to make concerning the validity of the Jicarilla Oil and Gas Severance Tax.

14. MEMORANDUM: Estimated length of trial is 4 days. Possibility of settlement of this case is considered poor.

DATED: August , 1977.

.....
H. Vearle Payne
United States District Judge

The foregoing proposed pre-trial order (prior to execution by the Court), hereby approved this 15th day of August, 1977.

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TONEY ANAYA
Attorney General,
State of New Mexico

THOMAS L. DUNIGAN
Deputy Attorney General
for Defendant Tony Martinez

ANSWER OF CECIL ANDRUS
IN NO. 77-292-P,
U. S. DISTRICT COURT,
NEW MEXICO

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[Caption, Civil 77-292-P omitted in printing]

ANSWER

(Filed August 24, 1977)

Comes now the defendant, Cecil Andrus, Secretary of the Interior by his attorneys Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney for said District and in answer to the Complaint herein states and alleges as follows:

FIRST CAUSE OF ACTION

1. Paragraphs 1 through 17 contain information about which defendant has no knowledge or information to form a belief and the same are therefore denied.

2. Defendant admits the allegations contained in paragraphs 18, 19, 20 and 21.

3. Paragraph 22 contains conclusions of law which require no answer but which are nevertheless denied and further states that this Court has no jurisdiction over the Jicarilla Apache Tribe or the Jicarilla Apache Tribal Council because of sovereign immunity of the Tribe and further lacks jurisdiction over the Secretary of the Interior in actions of this nature.

4. Defendant admits the allegations contained in paragraph 23.

5. Defendant admits that the leases identified in Exhibit A cover oil and gas development on Jicarilla Tribal lands but denies that paragraph 22 makes mention or reference to any Tribal oil or gas lease. Defendant further admits that Exhibit B is the form of oil and gas lease typically used for Indian Tribal land oil and gas development.

6. Defendant denies the allegations contained in paragraph 25.

7. Defendant admits the allegations contained in paragraph 26 except for the characterization "without hearing or due consideration". Defendant further states that a hearing was not required by law or regulation and that due consideration was given to pertinent laws and regulations.

8. In answer to paragraph 27 defendant admits that Ordinance No. 77-0-02 was adopted on July 9, 1976 but denies that such action was without lawful authority and further admits that Exhibit C is a copy of said Ordinance.

9. Defendant admits the allegations of paragraph 28 except for the characterization "without hearing or due consideration".

10. Paragraphs 30 and 31 contain conclusions of law which require no answer but which are nevertheless denied.

11. Defendant denies the allegations contained in paragraph 32.

SECOND CAUSE OF ACTION

12. In answer to paragraph 1 of plaintiffs' Second Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

13. Defendant denies the remaining allegations contained in the Second Cause of Action.

THIRD CAUSE OF ACTION

14. In answer to paragraph 1 of plaintiffs' Third Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

15. Defendant denies the remaining allegations contained in the Third Cause of Action.

FOURTH CAUSE OF ACTION

16. In answer to paragraph 1 of plaintiffs' Fourth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

17. Defendant denies the remaining allegations contained in the Fourth Cause of Action.

FIFTH CAUSE OF ACTION

18. In answer to paragraph 1 of plaintiffs' Fifth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

19. Defendant denies the allegations contained in paragraph 2.

20. In answer to paragraph 3 defendant admits the first sentence but is without sufficient information or knowledge to form a belief as to the remainder of the paragraph and it is therefore denied.

21. Defendant is without sufficient information, knowledge or belief to form an answer to paragraph 4 and the same is therefore denied.

22. Paragraphs 5 and 6 contain conclusions of law which require no answer but which are nevertheless denied.

23. Defendant denies the allegations contained in paragraph 7.

SIXTH CAUSE OF ACTION

24. In answer to paragraph 1 of plaintiffs' Sixth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

25. Defendant admits the first two sentences of paragraph 2 but states that the power of Indian tribes to tax non-Indian's use of Indian reservation property does not derive from Congressional authorization.

26. Paragraph 3 contains legal conclusions which require no answer but which are nevertheless denied.

SEVENTH CAUSE OF ACTION

27. In answer to paragraph 1 of plaintiffs' Seventh Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

28. Defendant admits the allegations contained in paragraphs 2, 3 and 4.

29. Paragraph 5 contains legal conclusions which require no answer but which are nevertheless denied.

EIGHTH CAUSE OF ACTION

30. In answer to paragraph 1 of plaintiffs' Eighth Cause of Action this defendant adopts his answers contained above in answer to paragraphs 1 through 31.

31. Paragraph 2 is a legal conclusion in answer to which defendant states that the Declaratory Judgment Act does not authorize a determination of the Constitutional rights of the Jicarilla Apache Tribe.

32. In answer to paragraph 3 defendant admits that a controversy exists but denies the controversy is justiciable by reason of the Tribe's sovereign immunity.

33. Defendant denies all allegations contained in plaintiffs' Complaint not specifically admitted herein.

WHEREFORE defendant states affirmatively that plaintiffs have failed to state a claim upon which relief may be granted; that the Court lacks jurisdiction over the defendants herein and that the Complaint should be dismissed, or, in the alternative, that this defendant should be granted summary judgment and that plaintiffs take naught by their action and for such other relief as the Court may deem appropriate.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
Assistant U.S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 24th day of August, 1977.

JAMES B. GRANT
Assistant U.S. Attorney

ANSWER OF CECIL ANDRUS
IN NO. 77-343-P,
U. S. DISTRICT COURT,
NEW MEXICO

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[Caption, Civil 77-343-P Omitted in Printing]

ANSWER

(Filed August 24, 1977)

Comes now the defendant, Cecil Andrus, Secretary of the Interior by his attorneys Victor R. Ortega, United States Attorney for the District of New Mexico, and James B. Grant, Assistant United States Attorney for said District in answer to the Complaint herein states and alleges as follows:

COUNT I

1. Defendant has insufficient knowledge or information to form a belief as to paragraphs 1 and 2 and the same are therefore denied.

2. Defendant admits the allegations contained in paragraph 3.

3. Defendant admits the allegations contained in paragraph 4 except it has insufficient knowledge or information to form a belief as to the responsibility for the enforcement and collection of the severance tax and that allegation is therefore denied.

5. Defendant admits the allegations of paragraph 5.

6. Defendant has insufficient information or knowledge to form a belief as to paragraph 6 and the same is therefore denied.

7. Defendant admits the allegations of paragraph 7.

8. Paragraph 8 contains conclusions of law which require no answer but which are nevertheless denied.

9. Defendant admits the allegations of paragraph 9 except as to the allegation concerning 25 U.S.C. 396 which is denied.

10. Defendant admits the allegations of paragraph 10.

11. In answer to paragraph 11 defendant admits the adoption of a "Revised Constitution" by the Tribe but denies the stated date and the characterization "without lawful authority or procedure".

12. Defendant admits the allegations of paragraph 12 except for the words "without hearing or due consideration" and states affirmatively that a hearing is not a requirement and that due consideration was given to pertinent statutes and regulations.

13. Defendant admits the allegations of paragraph 13 but denies the ordinance was adopted "without lawful authority".

14. Defendant admits the allegations of paragraph 14 but denies the characterization "without hearing or due consideration".

15. Defendant admits the allegations of paragraph 15.

16. Defendant denies the allegations of paragraph 16.

17. Paragraphs 17 and 18 contain conclusions of law which require no answer but which are nevertheless denied.

COUNT II

18. In answer to paragraph 1 defendant adopts his answers to Count I herein.

19. In answer to paragraph 2 defendant admits the tax applies only to oil and gas "produced on the Jicarilla Apache Reservation" and denies the balance of the allegations as they are conclusions of law.

20. Defendant admits the Secretary of the Interior approved the tax ordinance but denies the balance of the paragraph.

21. Defendant denies the allegations contained in paragraph 4.

COUNT III

22. In answer to paragraph 1 defendant adopts his answers to Count I herein.

23. Defendant admits the allegations contained in paragraph 2 and denies the allegations in paragraphs 3 and 4.

COUNT IV

24. In answer to paragraph 1 defendant adopts his answers to Count I herein.

25. The balance of Count IV contains conclusions of law which require no answer but which are nevertheless denied.

COUNT V

26. In answer to paragraph 1 defendant adopts his answers to Count I herein.

27. The balance of Count V contains conclusions of law which require no answer and statistics of which the defendant lacks sufficient information or knowledge to form a belief and paragraphs 2 through 7 are denied.

COUNT VI

28. In answer to paragraph 1 defendant adopts his answers to Count I herein.

29. Defendant admits the first sentence of paragraph 2 and denies the balance of that paragraph.

30. Defendant denies the allegations contained in paragraph 3.

COUNT VII

31. In answer to paragraph 1 defendant adopts his answers to Count I herein.

32. Defendant admits the allegations contained in paragraphs 2 and 3.

33. Paragraphs 4 and 5 contain conclusions of law which require no answer but which are nevertheless denied.

COUNT VIII

34. In answer to paragraph 1 defendant adopts his answers to Count I herein.

35. Defendant admits the allegations of paragraph 2.

36. Defendant admits the allegations of paragraph 3 except that the date of adoption of the Tribal Constitution was December 23, 1968.

37. Paragraphs 4 and 5 contain conclusions of law which require no answer but which are nevertheless denied.

38. Defendant denies the allegations contained in paragraphs 6 and 7.

COUNT IX

39. In answer to paragraph 1 defendant adopts his answer to Count I herein.

40. The balance of Count IX contains conclusions of law which require no answer but which are nevertheless denied.

COUNT X

41. In answer to paragraph 1 defendant adopts his answer to Count I herein.

42. Paragraph 2 contains conclusions of law which require no answer but which are nevertheless denied.

43. Defendant denies the allegations contained in paragraph 3.

COUNT XI

44. In answer to paragraph 1 defendant adopts his answer to Count I herein.

45. The balance of Count XI are conclusions of law which require no answer but which are nevertheless denied.

COUNT XII

46. All answers previously pled to Counts I through XI are adopted by reference to paragraph 1.

47. Defendant admits the first sentence of paragraph 2 and lacks sufficient information or knowledge to form a belief as to the balance of the allegations of paragraph 2 and the same are therefore denied.

48. Paragraphs 3, 5 and 8 contain conclusions of law which require no answer but which are nevertheless denied.

49. Defendant denies the allegations contained in paragraphs 4, 6, 9, 10 and 11.

50. Defendant lacks sufficient information or knowledge to form a belief as to the allegations contained in paragraph 7 and the same is therefore denied.

51. Defendant denies all allegations contained in plaintiffs' Complaint not specifically admitted herein.

WHEREFORE defendant states affirmatively that plaintiffs have failed to state a claim upon which relief may be granted; that the Court lacks jurisdiction over the defendants herein and that the Complaint should be dismissed, or, in the alternative, that this defendant should be granted summary judgment and that plaintiffs take naught by their action and for such other relief as the Court may deem appropriate.

VICTOR R. ORTEGA
United States Attorney

JAMES B. GRANT
James B. Grant
Assistant U. S. Attorney

THIS WILL CERTIFY that a true copy of the foregoing pleading was mailed to opposing counsel of record this 24th day of August, 1977.

J. B. GRANT
Assistant U. S. Attorney

MOTION FOR LEAVE TO AMEND ANSWER AND FOR REHEARING ON CERTAIN ISSUES AND AMENDMENT OF ANSWER OF JICARILLA APACHE TRIBE, ET AL., CASE NO. 77-343-P.

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MOTION FOR LEAVE TO AMEND ANSWER AND FOR A REHEARING ON CERTAIN ISSUES

Filed October 21, 1977

Come now the Defendants, Jicarilla Apache Tribe and Jicarilla Apache Tribal Council by their attorneys, Nordhaus, Moses & Dunn, and ask the Court for leave to amend by interlineation Defendants' Answer filed herein and for a rehearing on the claims of Plaintiffs that Congress gave the various states the exclusive rights, power and authority to levy taxes on the output of oil and gas wells on the Jicarilla Apache Reservation.

As grounds for Defendants' Motion for Leave to Amend and for Rehearing Defendants state:

1. It has come to the attention of Defendants that *all of the leases which are the subject of the within action* were issued under the authority of the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396, rather than under the authority of the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398, as appears from the certification of Harold TeCube, Realty Officer, Jicarilla Agency, Bureau of Indian Affairs, attached hereto. Plaintiff's Complaint alleged that the leases in suit were sold by the Secretary of the Interior with the consent of the Tribe pursuant to 25 U.S.C. 398 and 25 U.S.C. 396 (First Cause of Action, Paragraph 23). Plaintiffs purportedly attached a copy of the lease form as Exhibit "B", but the copy of the lease form was incomplete in that it did not include the "Forest and Land Protection Stipulations", which contained among other provisions the following:

> "The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Apache Indian Reservation, the lessees hereby agrees: . . . ."

By reason of the failure of Plaintiffs, advertent or inadvertent, to attach the complete lease as Exhibit "B" to the Complaint, and further because the Court neither required the Plaintiffs,

despite Defendants' objections, to introduce the leases in evidence nor to prove the authority for their issuance, (Trial Transcript, pp. 61-63), *the Court accepted Plaintiffs allegations and statements that all of the leases were issued under authority of 25 U.S.C. 398* (the Act of March 3, 1927) whereas actually, all of the leases subject to the litigation were issued pursuant to the Act of May 11, 1938, 25 U.S.C. 396a et. seq. The 1938 Act was a comprehensive leasing statute for Indians lands, which did not authorize taxation by states of production of oil and gas on lands leased pursuant thereto. Plaintiffs' Memorandum Brief, filed concurrently herewith, sets forth in detail the reasoning to support this conclusion.

2. The Court in its Findings of Fact entered July 6, 1977, in granting a Preliminary Injunction, found as follows:

> 6. That in enacting 25 U.S.C. 398(c) Congress intended to allow the states and local governments the right to tax oil and gas production from Executive Order Indian reservations.

The Court entered conclusions of law as follows:

> 3. By enacting 25 U.S.C. 398(c) Congress granted the states and local governments the authority to impose a severance tax upon oil and gas produced from Executive Order Indian reservations.
>
> 4. That the Jicarilla Apache Tribe is not a "state or local authority" as contemplated under 25 U.S.C. 398(c).

The authority of the states to tax production contained in the Acts of May 29, 1924 and March 3, 1927, *supra, was not continued in the comprehensive leasing Act of May 11, 1938. There being no authority to tax production by lessees whose leases were issued under the 1938 Act, there can be no limitation or preemption of the Tribe's authority to tax,* as set forth in Defendant's Memorandum Brief filed concurrently herewith.

It appearing that all of the leases at issue were authorized by the Act of May 11, 1938, 25 U.S.C. 396, rather than the Act of

March 3, 1927, 25 U.S.C. 398, the record should be corrected to establish the legal authority for issuance of the leases under which the Plaintiffs operate.

Respectfully submitted,
NORDHAUS, MOSES & DUNN

By ROBERT J. NORDHAUS

Robert J. Nordhaus
800 American Bank of Commerce
200 Lomas Boulevard NW
Albuquerque, New Mexico
87102
Telephone: 505/843-9440
Attorney for Defendants

This is to certify that a copy of the foregoing Motion was mailed to all opposing counsel on this 21st day of October, 1977.

ROBERT J. NORDHAUS
(Robert J. Nordhaus)

CERTIFICATION

I, Harold TeCube, Realty Officer, Jicarilla Agency, BIA., Dulce, New Mexico hereby certify that, I am Custodian of the BIA records pertaining to Oil and Gas leases on Jicarilla Apache Tribal lands and that the official BIA records of oil and gas lease sales in said Agency office indicated that all oil and gas leases on Jicarilla Apache Tribal lands were issued and are presently being operated pursuant to the Act of May 11, 1938. The notices of sale advertising said leases apecifically referred to the Act of May 11, 1938, as authority for issuance of said lease.

DATED this 20th day of October, 1977.

s/ HAROLD TECUBE

Harold TeCube
Realty Officer
Jicarilla Agency
Dulce, New Mexico

(Notarization Omitted in Privy)

[Caption, Civil 77-343-P omitted in printing]

AMENDMENT OF ANSWER OF JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND GWENDOLYN VELARDE*

(Filed October 21, 1977)

Comes now the Defendants, Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, by their attorneys, Nordhaus, Moses & Dunn, and for their answer to Intervenor Plaintiffs' Complaint state:

Defendants amend Paragraph 8 of Count I of their Answer to read as follows:

> "8. In response to Paragraph 9, these Defendants deny that the leases were granted by the Secretary of Interior with the consent of the Tribe pursuant to 25 U.S.C. 398, and admit that leases were granted by the Secretary of Interior with the consent of this Tribe pursuant to 25 U.S.C. 396.

Defendants amend Paragraph 2 of Count V of their Answer to read as follows:

> "2. Defendants deny each and every allegation contained in Paragraphs 2, 5 and 7 of Plaintiffs' Count V. Defendants state affirmativel, that 25 U.S.C. 398 and 398(c) are not applicable to the leases described in Plaintiffs' Complaint which were issued under 25 U.S.C 396(b) and that the State of New Mexico has no authority to tax production of lessees on Tribal lands where leases were issued under authority of 25 U.S.C. 396.

Defendants amend Paragraph 4 of Count VIII of their Answer to read as follows:

> "4. Defendants deny each and every allegation of Paragraph 5. Defendants state affirmatively that Sections

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* A similar amendment of answer was filed in Case No. Civil 77-292-P.

25 U.S.C. 398 and 398(c) are not applicable to the production on the leases described in the Complaint. Therefore, the states do not have the right to levy taxes on production on the leases described in Plaintiffs' Complaint.

Defendants amend Count XI, Paragraph 2 of their Answer to read as follows:

"2. In response to Paragraph 2, 3, 4, and 5, Defendants state that the allegations therein constitute legal conclusions for which no response is necessary. In the alternative, Defendants deny each and every allegation of Paragraph 2, 3, 4 and 5. Defendants state affirmatively that the oil and gas severance tax of the State of New Mexico, if valid, does not preempt the levy of severance taxes by the Tribe. Defendants further state that if such taxes are mutually exclusive, the taxes levied by the State of New Mexico are invalid because the State of New Mexico has no right or power to tax production on Indian lands leased under the Act of May 11, 1938, 25 U.S.C. 396 or under the New Mexico Enabling Act, 36 Stat. 557, 558-559 (1910) or the New Mexico Constitution.

Respectfully submitted,

NORDHAUS, MOSES & DUNN

By ROBERT J. NORDHAUS

Robert J. Nordhaus
800 American Bank
of Commerce Complex
200 Lomas Boulevard N.W.
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Telephone: 505/843-9440
Attorney for Defendants

This is to certify that a copy of the foregoing Amendment of Answer was mailed to all opposing counsel on this 21st day of October, 1977.

ROBERT J. NORDHAUS

ORDER DENYING MOTION TO AMEND ANSWER AND REHEARING ON CERTAIN ISSUES

[Consolidated Caption Omitted in Printing]

ORDER

(Filed December 21, 1977)

THIS MATTER comes on for consideration upon the motion of the defendants, Jicarilla Apache Tribe and Jicarilla Apache Tribal Council, for leave to amend their answer and for a rehearing on certain issues and the Court having reviewed the file, exhibits, letters submitted by the parties and memoranda therein and being fully advised in the premises concludes that the motion is not well taken and should not be granted;

NOW, THEREFORE,

IT IS BY THE COURT ORDERED that the defendants' motion for leave to amend and for a rehearing on certain issues be, and it is hereby denied.

H. VEARLE PAYNE
United States District Judge

COURTS' FINDINGS OF FACT AND CONCLUSIONS OF LAW

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COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed December 29, 1977)

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, are residents of the State of New Mexico.

2. Jerome T. McHugh is a resident of the State of New Mexico.

3. Chase Oil Company is a New Mexico Corporation with its principal place of business in New Mexico.

4. Dugan Production Corporation is a New Mexico Corporation with its principal place of business in New Mexico.

5. Consolidated Oil and Gas, Inc., is a Colorado corporation with its principal place of business in Colorado.

6. Southland Royalty Company, formerly Aztec Oil and Gas, is a Delaware Corporation with its principal place of business in the State of Texas.

7. Tesoro Petroleum Corporation is a Delaware Corporation with its principal place of business in the State of Texas.

8. Amerada Hess is a Delaware Corporation with its principal place of business in the State of New York.

9. Supron Energy Corporation, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. Energy Reserves Group, Inc., is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. Huber Corporation is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. Continental Oil Company is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. Atlantic Richfield Company is a Pennsylvania Corporation located within the State of California.

14. Phillips Petroleum Company is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. Tenneco Oil Company is a Delaware Corporation with its principal place of business located within the State of Texas.

16. Getty Oil Company is a Delaware Corporation with its principal place of business located in California.

17. Gulf Oil Corporation is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Mobil Oil Corporation is a Delaware Corporation with its principal place of business in the State of New York.

19. Oxy Petroleum, Inc., is a California Corporation, with its principal place of business in the State of California.

20. Amoco is a Delaware corporation with its principal place of business in Illinois.

21. Marathon is an Ohio corporation with its principal place of business in Ohio.

22. The Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §§476-477, residing on an Executive Order Indian Reservation within the boundaries of the State of New Mexico. The Jicarilla Apache Tribal Council exercises the legislative powers of the Jicarilla Apache Tribe. Gwendolyn Velarde is the Treasurer of the Jicarilla Apache Tribe and is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax. Cecil Andrus is Secretary of the Interior.

23. The plaintiffs hold leases, granted by the Secretary of the Interior with the consent of the Tribe, for the recovery of oil and gas on the Jicarilla Apache Indian Reservation. Plaintiffs are at present producing oil and gas products on the reservation and paying royalties to the Tribe. Approximately 80% of the products are shipped interstate for sale outside the State of New Mexico.

24. The State of New Mexico imposes and collects from the plaintiffs the following taxes measured by the production on the Jicarilla Apache Reservation:

Oil and gas emergency school tax;

Oil and gas conservation tax;

Oil and gas production equipment ad valorem tax; and

Oil and gas severance tax.

25. The Jicarilla Apache Tribe on November 22, 1968, adopted a revised constitution which included a provision authorizing the Tribal Council to enact ordinances providing for the levy and collection of taxes and fees on nonmembers of the Tribe doing business on the reservation. The revised constitution, as amended, was approved by the acting Undersecretary of the Interior on or about February 13, 1969.

26. On or about July 9, 1976, the Jicarilla Apache Tribal Council adopted the Jicarilla Oil and Gas Severance Tax in No. 77-0-02 and thereafter such ordinance was amended by Tribal Council Ordinance No. 77-0-195 and resolution 77-327.

27. That in enacting 25 U.S.C. §398(c) Congress intended to allow the states and local authorities the exclusive right to tax oil and gas production from executive order Indian reservations.

28. That in enacting 25 U.S.C. §398(c) Congress did not intend to include Indian tribes within the meaning of "state or local authority."

29. The Jicarilla Oil and Gas Severance Tax by its terms and the instructions for its implementation applies only to oil and gas produced on the Jicarilla Apache Reservation and not to similarly situated oil and gas produced in the same geological region of northwest New Mexico.

30. The Jicarilla Oil and Gas Severance Tax expressly provides for an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the tribe."

31. The Jicarilla Apache Tribal Oil and Gas Severance Tax as well as the written instructions directed to plaintiffs with regard to the payment of the tax, expressly provides that the tax need only be paid on gas, crude oil or condensate produced on the Jicarilla Apache Reservation "and sold or transported off the Reservation."

32. The Jicarilla Oil and Gas Severance Tax would, if valid, amount to over two million dollars annually.

33. That the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla Gas Severance Tax, if valid, onto their customers.

34. That if the plaintiffs are required to absorb the Jicarilla Oil Severance Tax such tax will substantially limit the ability of some of the plaintiffs to profitably operate some of the existing oil wells on the Jicarilla Apache Reservation.

35. If the wells operated by plaintiffs cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe.

36. That if the Jicarilla Apache Oil and Gas Severance Tax were valid the combined tax burden amounts to more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

37. That unless the Jicarilla Apache Tribal Severance Tax contained in Tribal Council Ordinance No. 77-0-02, as amended

by Tribal Ordinance No. 77-0-195 and resolution 77-327, is declared invalid and the defendants restrained from taking action they will move to enforce such Ordinances and resolutions and collect the Jicarilla Apache Tribal Oil and Gas Severance Tax.

38. The Jicarilla Apache Tribe Severance Tax become effective April 1, 1977. Under the terms of the ordinance, plaintiffs would be subject to the severance tax by virtue of their production of natural gas and condensate on the Jicarilla Apache Reservation. Enforcement of the tax has been stayed pending a resolution of the legality of the tax.

39. That plaintiffs sell the gas and oil produced from the Jicarilla Apache Reservation in both interstate and intrastate commerce.

40. Prior to their incorporation under the Indian Reorganization Act in 1937 the Jicarilla Apache Tribe had never attempted to exercise a power of taxation over non-Indians.

41. That in adopting the Indian Reorganization Act 25 U.S.C. §464 *et seq.* Congress intended Indian tribes accepting a charter thereunder to have only those powers specifically enumerated in the Act together with such powers as were "vested in any Indian tribe or tribal council by existing law." The power to tax non-Indians is not one of the enumerated powers given to Indian Tribes incorporating under 25 U.S.C. §464 and was not vested in the Jicarilla Apache Tribe by existing law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action.

2. That venue is proper in the United States District Court for the District of New Mexico.

3. That by enacting 25 U.S.C. §398(c) Congress granted the state and local authorities the exclusive right to impose a severance tax upon oil and gas produced from executive order Indian reservations.

4. That the Jicarilla Apache Tribe is not a "state or local authority" within the meaning of 25 U.S.C. §398(c).

5. The Jicarilla Apache Tribe Oil and Gas Severance Tax constitutes an unlawful multiple burden on interstate commerce.

6. The Jicarilla Apache Tribe Oil and Gas Severance Tax is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation and therefore discriminates against interstate commerce.

7. Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation.

8. That, as of the effective date of 25 U.S.C. §464, et seq., the power to tax non-Indians was not vested in the Jicarilla Apache Tribe or its Tribal Council, and not being one of the powers enumerated in the Act, the Secretary of the Interior's approval of the Tribal Constitution cannot operate to vest such power in the Tribe.

9. An actual justiciable controversy exists between the plaintiffs and defendants under the meaning of the Declaratory Judgment Act, 25 U.S.C. 2201 *et seq.* and pursuant to that act this Court declares the Jicarilla Oil and Gas Severance Tax to be illegal, unconstitutional, invalid and void and in conjunction with this Declaratory Judgment issues a permanent injunction restraining defendants from taking any action to collect the Jicarilla Apache Oil and Gas Severance Tax.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

H. VEARLE PAYNE
United States District Judge

JUDGMENT,
U.S. DISTRICT COURT
NEW MEXICO

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JUDGMENT

(Filed December 29, 1977)

THIS MATTER having been heard by the Court and the Court having studied the briefs submitted by the parties, heard the testimony, evidence and arguments of counsel and having entered its Findings of Fact and Conclusions of Law and being otherwise fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid and void, it is therefore,

ORDERED that a Permanent Injunction is herewith issued and that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with defendants be, and they hereby are restrained and enjoined from taking any action to enforce or collect the Jicarilla Apache Oil and Gas Severance Tax.

IT IS FURTHER ORDERED that the plaintiffs and intervenors recover their costs to be taxed by the Clerk of the Court.

H. VEARLE PAYNE

United States District Judge

ORDER OF DISMISSAL

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[Consolidated Caption Omitted in Printing]

ORDER OF DISMISSAL

(Filed May 22, 1978)

This matter having come before the Court on the motion of Plaintiffs in No. 77-343-P for an Order of Dismissal as to their claims against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, and the Court being fully advised in the premises finds that such motion should be granted. It is therefore

ORDERED that the claims of the Plaintiffs in No. 77-343-P against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, shall be and the same hereby are dismissed, provided that if the Judgment entered herein on December 29, 1977, concerning the claims of all Plaintiffs against the Defendants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Cecil Andrus, Secretary of the Interior, and Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, should hereafter be reversed or otherwise set aside, and if the issues presented by such claims should be remanded to this Court, then the claims of the Plaintiffs in No. 77-343-P against the Defendant Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, shall be reinstated and may be determined at such time, subject to the right of the Defendant Martinez to assert and have decided whatever defenses he might have to such claims, including any defenses challenging the jurisdiction of this Court to determine such claims.

H. VEARLE PAYNE
United States District Judge

APPROVED:

THOMAS L. DUNIGAN
Thomas L. Dunigan
Deputy Attorney General

JOHN R. COONEY
John R. Cooney
Modrall, Sperling, Roehl, Harris & Sisk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (AS AMENDED), DECIDED FEBRUARY 22, 1980

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 78-1154

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, AND GULF OIL CORPORATION,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.

Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. Nos. 77-292P & 77-343P)

Robert J. Nordhaus and Terry D. Farmer, of Nordhaus, Moses & Dunn, Albuquerque, New Mexico, for Defendants-Appellants, Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde.

Maryann Walsh, Attorney (James W. Moorman, Assistant Attorney General, Sanford Sagalkin, Deputy Assistant Attorney General, Neil T. Proto, Attorney, Peter R. Steenland, Jr., Attorney, Department of Justice, with her on the briefs), Washington, D. C., for Defendant-Appellant Cecil Andrus, Secretary of the Interior.

Bruce D. Black of Campbell, Bingaman & Black, P.A., Santa Fe, New Mexico, and Jason W. Kellahin of Kellahin & Kellahin, Santa Fe, New Mexico, for Plaintiffs-Appellees Merrion and Bayless, et al.

John R. Cooney of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico (R. H. Landt of Amoco Production Company, Denver, Colorado, Richard L. Marler of Marathon Oil Company, Findlay, Ohio, Mark B. Thompson, III, of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, with him on the briefs), for Plaintiffs-Appellees Amoco Production Company and Marathon Oil Company.

George P. Vlassis (Lawrence A. Ruzow, Katherine Ott, Gary Verburg, of counsel) of Vlassis, Ruzow & Crowder, Phoenix, Arizona, filed an amicus curiae brief for the Navajo Nation.

Reid Peyton Chambers of Sonosky, Chambers & Sachse, Washington, D. C. and Marvin J. Sonosky of Washington, D. C., of counsel, filed an amicus curiae brief for the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes.

Charles A. Hobbs of Washington, D. C., filed an amicus curiae brief for National Congress of Americans Indians, Inc., the Arapaho Tribe of the Wind River Reservation, and the Three Affiliated Tribes of The Fort Berthold Reservation.

Toney Anaya, Attorney General, and Jan Unna, Special Assistant Attorney General, the State of New Mexico, Santa Fe, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Robert B. Hansen, Attorney General, Richard L. Dewsnup, Dallin W. Jensen, Frank V. Nelson, Assistants Attorney General, of the State of Utah, Salt Lake City, Utah, filed an amicus curiae brief for the State of Utah.

John J. Rooney, Acting Attorney General, the State of Wyoming, Cheyenne, Wyoming, Alan I. Olson, Attorney General, the State of North Dakota, Bismarck, North Dakota, and Mike Greeley, Attorney General, the State of Montana, Helena, Montana, filed an amicus curiae brief for the States of Wyoming, North Dakota and Montana.

Before SETH, Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN, Circuit Judges (en banc).

LOGAN, Circuit Judge.

This appeal arises out of two suits, consolidated for trial, brought by appellees against the Jicarilla Apache Tribe and its Tribal Council (the Tribe). Appellees (lessees), who are non-Indians, produce oil and gas from within the Tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior. After the Tribe enacted an oil and gas severance tax to be measured by production from oil and gas wells within the reservation, lessees sued the Tribe and Secretary of the Interior, Cecil Andrus,[1] seeking a declaratory judgment and

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[1] In one of the essentially identical cases Gwendolyn Velarde, Treasurer of the Tribe, and Tony Martinez, Executive Director of

injunction that would prohibit enforcement of this tax. After a nonjury trial, the judge permanently enjoined enforcement declaring the tax "illegal, unconstitutional, invalid and void."

The issues on appeal are whether,

(1) the district court had jurisdiction over the claims against the Tribe and the Secretary of the Interior,

(2) the Tribe has the inherent power to levy the severance tax,

(3) the tax violates the Commerce Clause of the United States Constitution, and

(4) Congress preempted tribal taxation.

The Jicarilla Apache Tribe is an Indian Tribe occupying an executive order reservation in northwestern New Mexico. The Tribal Council is the legislative arm of the Tribe's government. In 1968 the Tribe adopted a revised constitution pursuant to the Indian Reorganization Act of 1934, §§16, 17, 25 U.S.C. §§ 476, 477. Article XI of that constitution provides, in pertinent part,

> Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior and the restrictions established by this revised constitution.
>
> . . . .
>
> (e) Taxes and Fees. The tribal council may levy and collect taxes on fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the

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the New Mexico Oil and Gas Accounting Commission, were named as individual defendants. Prior to trial Martinez was dismissed from the suit without prejudice.

Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

The revised constitution was approved by the Under Secretary of the Interior in 1969.

In 1976 the Tribal Council adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." The operators are required to pay the tax, which is due at the time of severance and is payable monthly. The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation." "Royalty gas, oil or condensate, taken by the Tribe in kind, and used by the Tribe" is exempt from taxation. The Secretary, through the Acting Area Director of the Bureau of Indian Affairs, formally approved the tribal ordinance in December of 1976.

Among the trial court's findings are the following: Approximately 80% of the oil and gas produced by lessees is shipped interstate for sale outside the state of New Mexico; the tax would generate over two million dollars annually; the lessees would be able to pass the majority of the tax burden on to their customers; if the lessees are required to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells "would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe"; and the tax burden on the price of oil and gas would be more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

Based upon these findings the trial court held that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empower the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple

burden on interstate commerce in violation of the Commerce Clause.

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. §702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe cannot be sued absent consent. *See also* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Here the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court. The ordinance was approved by the representative of the Secretary of the Interior. The question is whether this constitutes effective consent.

We see no reason in principle or in law to conclude a Tribe that has taken advantage of Congress' encouragement to organize for purposes of providing for its common welfare under 25 U.S.C. § 476, has adopted a constitution, and has formally attempted to waive its sovereign immunity in this ordinance, may not do so. We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of Interior. We therefore hold the trial court had jurisdiction over the Tribe.[3]

II

In treating the merits of this appeal, we first consider the basic question whether the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction. The tax instituted by the Tribe here is an excise or privilege tax imposed on the occupation of severing oil and gas from tribal land, measured by quantity produced. *See* Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934). *See also* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). Since no treaty or act of Congress specifically authorizes the exercise of such a taxing power, we must decide whether that power is among those

[3] Even were we to conclude the ordinance did not constitute effective consent, it is clear that the court properly reached the merits in one of the cases consolidated for trial. Plaintiffs Amoco Production Company and Marathon Oil Company, in addition to naming the Tribe and Tribal Council as defendants, sued individually the tribal official charged with the enforcement and collection of the tax. The Tribe's immunity from suit does not extend to tribal officials; therefore the trial court properly heard this case. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

"vested in any Indian Tribe or tribal council by existing law," Indian Reorganization Act of 1934, §16, 25 U.S.C. §476, *i.e.*, whether the Tribe has the inherent power to levy this tax. In making this determination, we recognize the fundamental principle that the power of taxation, which is essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819).

It has long been recognized that Indian tribes, although once self-governing political nations, no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, the tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation. Oliphant, 435 U.S. at 208-09; United States v. Wheeler, 435 U.S. 313, 323 (1978).

While the Supreme Court has not passed directly upon the question before this Court, it has determined that certain powers were not retained by the tribes upon their incorporation because of the superior interests of the United States. It has long been established, for example, that the tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Because of the United States' interest in protecting its external political boundaries, the tribes as sovereign entities may not deal with foreign nations. The Cherokee Nation v. Georgia, 30 U.S. (5

Pet.) 1, 17-18 (1831). Most recently, the Supreme Court determined that the tribes also gave up the power to exercise criminal jurisdiction over non-Indians, on the ground the power of the tribes to restrict the personal liberty of United States citizens' conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

We do not find that tribal tax legislation in the context of this case necessarily and in every instance implicates a sovereign federal interest in the same way criminal adjudication, sale of tribal land, and governmental dealings with foreign nations does. The federal taxing power is in no way impinged; clearly the federal government can tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax. Nor is there a general sovereign interest in preventing persons from being taxed by governmental entities other than itself.

A national, if not sovereign, interest in preventing deprivations of property without due process is manifested in the Fifth and Fourteenth Amendments. In the context of taxing, however, that interest is implicated only in the extremely rare case in which the taxing power is so abused the result is in reality not a tax, "but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). *See also* City of Pittsburgh v. Alco Parking Corp. 417 U.S. 369 (1974); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910). That is not the situation in the instant case.

Neither can we conclude that the "national interest in free and open trade" between the states, expressed by the Commerce Clause of the Constitution precludes tribal taxation. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). Just as the clause serves only as a limitation on state taxation

powers, *id.* at 329, it limits but does not destroy tribal powers of taxation. *See* Part III, *infra.*

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any nonmembers of their tribe. *See* Wheeler, 435 U.S. at 326; Oliphant, 435 at 208-11. For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." 435 U.S. at 326. For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence of inherent powers. The critical factor in the cases is whether important interests of the United States, other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private, voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than private, voluntary associations, United States v. Mazurie, 419 U.S. 544, 557 (1975), and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign

nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-323 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

Also persuasive are Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality. As early as 1823 the Court recognized in Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923), that voluntary transactions of nonmembers with the Tribes or their members within the confines of the reservation would subject that nonmember, at least regarding that transaction, to the laws of the tribe. *Id.* at 593. Similarly, Williams v. Lee, 358 U.S. 217 (1959), held that a state court was without jurisdiction to hear a simple contract action brought by a nonmember against an Indian concerning a transaction entered into on the reservation. The Court's stated rationale was premised in part upon the territorial aspect of the tribe's right to self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted). *See also* United States v. Mazurie, 419 U.S. 544 (1975). While the territorial element of inherent tribal power is not necessarily exclusive, *see, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Thomas v. Gay, 169 U.S. 264 (1898), and may not exist in some circumstances, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), we do not think the decisions eliminate this aspect of tribal powers.

We are also persuaded by "the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts," Oliphant, 435 U.S. at 206, that the tribes retain the

power to levy a tax that falls upon nonmembers doing business on the reservation. Prior to the Indian Reorganization Act of 1934, 25 U.S.C. §476 (the Act), which was intended to facilitate tribal self-government, one decision by the Supreme Court and three by the Eighth Circuit approved imposition of tribal taxes on nonmembers doing business on the reservation. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion,* 203 U.S. 599 (1906); Maxey v. Wright, 105 F. 1003 (8th Cir.) *aff'd* 3 Ind. Terr. 243, 54 S.W. 807 (1900); Crabtree v. Maxey, 54 F. 426 (8th Cir. 1893). The Attorney General of the United States also approved similar taxes. *E.g.,* Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901); Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884).

The parties to this appeal forcefully dispute the characterization of these decisions — the Tribe argues these decisions involved the inherent power to tax; the lessees argue they merely support the proposition that tribes have the proprietary, but not sovereign, right to exact fees from persons desiring to enter the reservation and do business therein. From our reading of the cases and opinions, we conclude that the decisions were grounded upon tribal sovereignty, with the exception of Choctaw and Chickasaw Permit Laws, 18 Op, Att'y Gen. 34 (1884). But two different sovereign powers have been relied upon — the power to tax, *e.g.,* Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business therein. *E.g.,* Buster v. Wright, 135 F. at 950. The Supreme Court in *Morris* v. *Hitchcock* appears to have recognized both theories. 194 U.S. at 389-93.

The case before us presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty. Thus, it seems important to ascertain whether particular treaties influenced the decisions discussed above. Although the

United States did not always require tribes to give up the power to exercise civil jurisdiction over nonmembers and their property within the reservation, *see, e.g.*, Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174, 176 (1855), nearly all of these tribes had done so. *See, e.g.*, Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd*, 194 U.S. 384 (1904). Yet throughout the decisions is the sometimes explicit and sometimes implicit assumption that tribal exercise of power over nonmembers doing business on the reservation in connection with that business did not offend the interests of the United States and was a sovereign right retained by the tribes. Two cases decided by the Eighth Circuit after passage of the Act expressly upholding tribal taxes on the theory of the power of taxation share this assumption. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

Congress also apparently recognized tribal power to tax nonmembers within the reservation when it passed section 16 of the Act, which confirmed the existence of sovereign tribal powers generally. In hearings conducted prior to passage of the Act, Congress was apprised of the holding of Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. on Indian Affairs*, 73rd Cong., 2d Sess. 269-70 (1934). Solicitor Margold of the Department of Interior, in an opinion, considered the intent of Congress in its reference in section 16, to "all powers vested in any Indian tribe or tribal council by existing law." Among those retained powers, he concluded that

> [c]hief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept

> privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934). This opinion, virtually contemporaneous with the Act, is persuasive evidence that neither Congress nor the Department of Interior believed a tribal taxing power would conflict with the interests of the United States. *See also* United States Department of the Interior, Federal Indian Law 435-39 (1958); 1 Final Report of the American Indian Policy Review Comm'n 154-58, 178-82 (1977). Consistent with its interpretation of the Act, the Department approved the tax involved in this case. As the agency charged with construction of the Act in the course of its actual execution, the Department's conclusion that Indian tribes retain the power to levy a tax of the type involved here deserves great respect. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

Except for the dollar sums involved, which are irrelevant, *see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), we see no essential difference between the privilege taxes here levied and those approved by the Supreme Court in *Morris* v. *Hitchcock* and in the Eighth Circuit cases cited above. For all the reasons discussed above, we conclude that the Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers.

III

We now consider the argument that the severance tax violates the Commerce Clause. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. We believe the national interest manifested in the Commerce Clause is not sufficient to preclude the tribes' power to tax, but this clause of its own force limits the power of the tribes as well as the states. *See* Boston Stock Exch. v. State Tax

Comm'n, 429 U.S. 318, 328 (1977). It has long been established that the tribes constitute a separate category within that clause. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831). Since the tribes are not "states," *see id.* at 16, United States v. Wheeler, 435 U.S. 313 (1978), and necessarily are located within the boundaries of one or more states, they are not subject directly to those doctrines implementing the phrase "among the states."

It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that this national interest is measured by traditional analyses. The trial court found the tax imposed by the tribe both discriminates against interstate commerce and constitutes a multiple burden on commerce. We treat first the discrimination question.

The trial court's stated reason for holding the tax discriminates against interstate commerce is that the tax "is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation." This reason, which simply tracks the language of the ordinance, can be interpreted in two ways.

The first interpretation is that the tax provides "a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). Although there actually is no Indian production here, the ordinance by its terms would apply to any operator engaged in severing the subject resources within the reservation. Apparently, the trial court viewed the provision exempting "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as the requisite local preference. We disagree. Subjecting royalty products the Tribe would receive to its

own tax would be a fruitless and wasteful act. We therefore think the exemption is permissible.

Second, in view of the trial court's finding that eighty percent of the hydrocarbons produced on the reservation entered interstate commerce, which we accept as true for purposes of this appeal, the court's conclusion of law can mean it believed the tax is to be levied on the privilege of engaging in interstate commerce itself. Were this correct, the standards of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), would be applicable.[4] However, it is settled that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). *See* Dunbar-Stanley Studios, Inc. v. Alabama, 383 U.S. 537, 541 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961); Hope Natural Gas Co. v.

[4] The *Stevedoring* case, building upon *Complete Auto Transit* eliminated the distinction between direct and indirect taxation of interstate commerce when the tax is measured by gross proceeds. 435 U.S. at 743-51. With that distinction fell the *per se* rule forbidding taxation of interstate commerce. *Id.;* 430 U.S. at 287-89. A tax falling within the ambit of these cases is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. *See id.* at 287; 435 U.S. at 750-51. We need not decide whether a severance tax measured by quantity produced within a single jurisdiction falls within the ambit of this new doctrine. Obviously the questioned tax falls on activity — production — with a substantial nexus with the reservation. The tax does not raise the apportionment problem because it is measured by quantity, and as we have determined, it does not discriminate against interstate commerce. If the *Stevedoring* and *Complete Auto Transit* analysis applied, the only question is whether the tax is fairly related to services provided by the reservation. Lessees did not build a factual foundation in the record to challenge the tax on this ground, since they relied upon the rejected *per se* rule. Thus there is no basis on which to hold the tax invalid on this ground. *See* 435 U.S. at 750-51.

Hall, 274 U.S. 284 (1927). This is true even though the severed product is destined for immediate entry into interstate commerce, Arctic Maid, 366 U.S. at 204; Oliver Iron Mining Co., 262 U.S. at 177-78, and even though the cost of interstate commerce is increased. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 612 (1938). *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977). The Tribe's tax fits within this line of cases.

The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

The trial court also held the tax invalid as a multiple burden on interstate commerce, apparently because New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an oil and gas production equipment ad valorem tax. *See* N.M. Stat. Ann. §§7-29-1 to 7-29-22; *id.* §§7-31-1 to 7-31-25; *id.* §§7-30-1 to 7-30-26; *id.* §§7-34-1 to 7-34-20 (1978. The Supeme Court, in Western Live Stock v. Bureau, 303 U.S. 250 (1938), explained

the basis for finding this type of violation of the Commerce Clause as follows:

> The vice characteristic of [local taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed ... or added to ... *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Id. at 255-56 (citations omitted) (emphasis added). Applying this analysis, we hold the trial court erred.

We first note that the focus is upon the type of tax that every state may impose with equal right. It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation. There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause. That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of interstate commerce at all, we believe. Rather it raises two different questions — whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians, a question we do not reach, and whether a Congressional grant of authority to levy the state tax preempts tribal taxation, addressed in Part IV, *infra.*

We hold the federal interest in interstate commerce, manifested in traditional Commerce Clause analyses, does not limit the Tribe's power to impose this tax.

IV

We next consider whether Congress has preempted the exercise of the Tribe's power to levy the severance tax. The trial court held that by granting to the states the right to tax the production of oil and gas on executive order reservations, Congress intended to preempt similar tribal taxation. The basis of this ruling is 25 U.S.C. §398c, which provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Emphasis in original). Section 398c was an integral element of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, which also settled then unresolved questions concerning the status of Indian mineral rights in executive order reservation lands and granted to the Indians all the royalty, rental and bonus income from oil and gas leases on their reservations. *See id.* §2, 44 Stat. 1347 (codified at 25 U.S.C. §398b). *See also* SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926).

In construing this statute, we must apply the

> "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). See *Choate* v.

Trapp, 224 U.S. 665, 675 (1912); *Antoine* v. *Washington*, 420 U.S. 194, 199-200 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976). Fairly read, this statute does not by its terms preclude tribal taxation of lessees engaged in the business of producing oil and gas from within executive order reservations. Moreover, the legislative history, which reflects Congress' awareness of the need at that time for express authorization of state taxation of Indians and of non-Indians doing business with Indians on the reservation, does not show an express or implied intent to preempt tribal taxation. *See* H.R. REP. NO. 1791, 69th Cong., 2d Sess. 4 (1927); SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926); 68 CONG. REC. 4569-81 (1927); 67 CONG. REC. 10912-25 (1926); 66 CONG. REC. 2233-34 (1925); 66 CONG. REC. 998-99 (1924).

A careful reading of the legislative history convinces us that Congress simply did not think of the issue when it enacted the statute, even though the Supreme Court and the Eighth Circuit had approved tribal taxation of non-members under similar circumstances. *See* Part II, *supra*. There was dispute over whether the Indians should receive all of the royalty income from leases of reservation lands. Legislators who opposed the Act as too generous might well have voted against giving the Indian tribes power to levy taxes, but the majority, who obviously thought that all benefits from the minerals on the reservations belonged to the Indians, might well have voted the other way. At no time when the state taxes were mentioned was there any discussion that the amount of such taxes might be relevant to passage of the Act. We therefore conclude that section 398c, being part of an act passed to benefit the Indians and ambiguous in letter and intent with respect to tribal taxation, does not preempt the tribal tax ordinance at issue in this case.[5]

[5] The Tribe also argues that New Mexico has no power to levy its severance tax on production within the reservation. Its argument in essence is that the General Leasing Act of 1938, ch. 198, 52 Stat.

It also may be argued that by virtue of its regulation of the leasing process, Congress preempted independent tribal taxation of those acquiring leases by that process. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (all-inclusive federal regulations and statutes applicable to trading on the reservations with Indians preempt state taxation of traders doing business thereunder). In essence, the argument is that by prescribing the procedures for the acquisition of leases and determining the royalty, bonus and rental payments the Indians are to receive, Congress intended that no burdens other than those embodied in the leases be imposed on the lessees.

When Congress first authorized leasing of land within executive order reservations for oil and gas purposes in the Act of March 3, 1927, ch. 299, §1, 44 Stat. 1347 (codified at 25 U.S.C. §398a), it provided that the same rules apply as for leasing oil and gas interests on other types of reservations. *See* 25 U.S.C. §§397,398. Thus, the Secretary of the Interior, with the consent of the tribal council, was charged with the responsibility of conducting a public auction to obtain the best terms possible for the Indians. *See* 25 U.S.C. §398. But in 1938 Congress effected a change in this scheme that is significant for our purposes. The General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§396a-396g), intended to make uniform the various laws applicable to the leasing of Indian lands for mining purposes and to conform the laws to the purposes of the Indian Reorganization Act of 1934, §§16, 17, 25 U.S.C. §§476,477. *See*

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347 (codified at 25 U.S.C. §§396a-396g), which makes uniform the laws applicable to leasing of mineral rights on Indian reservations, and does not contain a specific grant of power to the states comparable to that found in the Act of March 3, 1927, ch. 299, §3, 44 Stat. 1347 (codified at 25 U.S.C. §398c), repealed the latter provision. See §7, 52 Stat. 347. Because the State of New Mexico is not a party to this litigation and we hold the State's power to tax, if any, is not exclusive, we do not reach this question. For the same reasons we do not address the Tribe's contention that the trial court erred in not allowing the Tribe to put the leases into evidence to show whether they were granted under §398c or under §396a.

H.R. REP. NO. 1872, 75th Cong., 3d Sess. (1938). Therefore, it elaborated on the procedures to be followed for leasing oil and gas interests. But of greater significance is the proviso found in that section, which allows tribes organized and incorporated under 25 U.S.C. §§476, 477 to assume and define for themselves the leasing process.[6]

Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. § 476, determine the terms upon which they will lease their lands and regulate the operations of their lessees.[7] Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas

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[6] 25 U.S.C. §396b provides:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such adverisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 464-475, 476-478, and 479 of this title.* (Emphasis added).

[7] The Secretary of the Interior has implemented by regulation the substance of the proviso as follows:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action

leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues. It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." City of St. Louis v. United Rys. Co., 210 U.S. 266, 280 (1908). *See also* New Orleans City & Lake R.R. v. City of New Orleans, 143 U.S. 192 (1892).

We have considered the remaining contentions of the parties and do not find them to be dispositive.

The judgment of the trial court is reversed and remanded with direction to enter judgment in favor of appellants.

Nos. 78-1154 and 78-1251

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

McKAY, Circuit Judge, concurring:

While I concur fully in the opinion of the court, I file this statement to emphasize certain considerations dictating the result reached.

As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should

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authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. § 171.29 (1979).

begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were "the Indian Tribes."[1]

Beginning with the ratification of the Constitution, it is essential to examine both the actual dealings with the tribes and the language employed in those dealings in order to comprehend the tribes' special status. Even the conquering government characterized them as "nations." The early Supreme Court decisions incorporate those national concepts as, for instance, in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall wrote: "[A] weaker power does not surrender its independence — its right to self government, by associating with a stronger and taking its protection." *Id.* at 561. Both the language and formality of treaties were employed in defining the tribes' special status. Indeed, "[t]he Indian tribes were recognized as powers capable of making treaties before the United States was." F. Cohen, *Handbook of Federal Indian Law* 274 (1942).

The source of cession of Indian lands is of relatively little consequence. Whether the lands came from the exaggerated claims of dominion asserted by France, Spain, Russia, or Mexico, our government continued to treat the Indian tribes with the same essential assumptions. For example, the President negotiated and the Senate ratified a treaty with the Mescalero Apaches — a nation of Indians living within the land ceded by Mexico — only four years after the Treaty of Guadalupe Hidalgo. *See* Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). In no sense, then, were all vestiges of governmental

[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. 1, § 8.

power abolished in the New Mexico tribes. Thus, we see that the Indians were never treated as mere corporations, mere landholders or mere associations. While it is true that Congress did not formally ratify the proposed treaty with the Jicarilla, that fact does not derogate from the general underlying assumptions about the tribe's historic status. A congressional failure to ratify a treaty does not convert a "nation" into a voluntary association. The profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation." F. Cohen, *Handbook of Federal Indian Law* 299 (1942) (citing 34 Op. Att'y Gen. 181, 186-89 (1924)).

Tribes have characteristics of sovereignty not enjoyed by the kinds of proprietary and fraternal bodies which the Chief Judge asserts are most analogous to the tribes. If we were to deny the importance of sovereignty in our analysis, we would be ignoring the clear dictates of the Supreme Court. *See, e.g., Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973). Indeed, the Court has consistently held the tribes to have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58.

Indian "self-determination" is not in substance the same as that of any voluntary association. *Congress* has explicitly "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). And the principle of self-determination may be said to *require* protection of territoriality. *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 Harv. C.R.-C.L. L. Rev. 357, 390 & 390 n.154 (1978).

Even though *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), shies away from the prospect of non-Indians answering to Indian tribunals for *criminal* behavior, it nonetheless confirms that tribes enjoy sovereign powers not remotely granted to corporations, voluntary associations, and the like. *Id.* at 208. Those powers may be subject to divestiture by the superior federal power, but such divestiture is implied only if the powers are inconsistent with the tribes' status. *Id.* In a limited area, *Oliphant* found divestiture, but "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 508 (1979). Tribes clearly do have governmental authority over nonmembers in many instances. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property intersts of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 65. *See United States* v. *Mazurie,* 419 U.S. 544 (1975); *Williams* v. *Lee,* 358 U.S. 217 (1959).

The reservation tribes, including the Jicarilla, typically and with congressional approval have operated as governments. There can be no doubt that the federal government, because of the special authority granted it in dealing with the Indians, has the power either to confirm in them or to grant to them typical municipal powers whether they be police powers, regulatory powers or fiscal powers. It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes. Such taxes certainly do not offend the concerns expressed in *Oliphant* because historically and conceptually these taxes are associated with land, even though the impact may ultimately fall on individuals, Indian or non-Indian.

Finally, because the case is so often cited, I think it important to emphasize that *Puyallup Tribe, Inc.* v. *Department of Game,* 433 U.S. 165 (1977), provides no authority whatsoever for the State of New Mexico to assert jurisdiction over Indian reservations. The Chief Judge correctly notes that the case upheld the right of the State of Washington to regulate the netting of steelheads by individual Puyallup Indians. However, unlike New Mexico, Washington had explicitly asserted Public Law 280 "civil and criminal jurisdiction within the [Puyallup] reservation for most purposes." *Id.* at 175, 175 n.14. In addition, in contrast to the Jicarilla reservation, the Puyallup reservation has ceased to exist for all practical purposes. The Puyallups have alienated all but 22 acres of their 18,000 acre reservation, and none of the remaining 22 acres abuts on the river in question. *Id.* at 174. Furthermore, although the Jicarilla Apaches have not done so, a tribe may voluntarily relinquish some of its jurisdictional rights. In *Puyallup Tribe,* the Court interpreted the relevant treaty as permitting state regulation. *Id.* at 175.

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No. 78-1251

AMOCO PRODUCTION COMPANY, et al. v.
JICARILLA APACHE TRIBE, et al.

SETH, Chief Judge, dissenting:

I must dissent from the majority opinion for several reasons.

I would begin the analysis of the issues presented in this appeal at a very early date to place the matter in its historical context. Thus, in my view, the consideration of this appeal should *not* start with an analysis of "sovereignty," as the Secretary urges, as this includes too many assumptions and generalizations which are questionable but which nevertheless influence the outcome. As so often happens when a start is made too far

along the sequence of events or the development of doctrines the selection of a place to start determines where the writer is going to come out. Thus I would start instead with an examination of the fundamental relationships as they existed initially between the federal government and the Jicarilla Apaches, and this relationship as influenced by the creation of the State of New Mexico.

The Jicarilla Apaches were then and now are in the area ceded to the United States after the war with Mexico. The Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922) contained provisions for the recognition of land titles, and the proprietary interests of the citizens of Mexico within the area ceded. No separate mention is therein made of Indian lands or any recognition given to Indian groups other than border problems. These groups had been under the rule of Spain and of Mexico for two hundred years. They were in an area settled by Spain and Mexico and in frequent contact over the years. The Pueblo Indians had received grants of land as had non-Indian groups. The Treaty treats all persons within the ceded area in the same way. The Treaty of Guadalupe Hildago thus spoke for all persons within the geographical area concerned, as would any treaty. There was no separate treatment of particular areas or groups and there was no reason why there should have been. All persons had been subjects of the Spanish crown and the government of Mexico for several hundred years. The sovereignty was thus *transferred* from the government of Mexico to the United States. This was not an area being occupied by the first foreign sovereign to come on the scene wherein it would be expected that the various groups of inhabitants would be dealt with separately or differently. Instead it was the conclusion of a war between two nations one of which, with its predecessor, had exercised complete authority and sovereignty over the land and all the people for several hundred years. With the end of the war and the peace treaty all the persons in the ceded area who stayed automatically came under the complete authority of the United States. They

were thereby transferred from one sovereign to another. The citizenship issues have been treated by a number of authorities and need not be considered here because there is no question as to the complete authority of the new sovereign over all the people as a consequence of the Treaty with Mexico and the position as a successor.

At the end of the Spanish occupation there were in New Mexico and Arizona some six or eight independent Apache tribes. One of these was the Jicarilla Apaches. In 1846 after the period of Mexican sovereignty the Jicarillas numbered about 500 according to Governor Bent. There were then in all ten to twelve groups, each consisting of eight to ten family units, with a total of about forty-five individuals. Albert H. Schroeder, *Apache Indians I* (Garland Publishing Co. reprints, reports and exhibits) [hereinafter cited as Schroeder]. The basic unit was the family group. There were no clans or gentes, M. E. Opler, referring to the Jicarillas (as quoted by Schroeder), writes:

> "The Tribe was a rather nebulous entity of its members. The band was a man's immediate concern.
>
> . . . .
>
> "They were semi-nomads, following wild food harvests.
>
> . . . .
>
> "The people living in one section of the tribal range would seldom meet their tribesmen of a more distant quarter."

Opler also writes that the local groups would form a loose confederation for social purposes, and for defense or aggression. When the small units banded together for war a leader was accepted by agreement, but each individual was free to come or go at will or reject the leader (Schroeder). As early as 1796 Colonel Don Antonio Cordero, as to all Apaches, reported (per Schroeder): "At present they do not compose one nation of uniform customs, usages and tastes." There was, of course, no central authority for the Jicarillas at any time. Each autonomous group would winter around their geographic

landmark near the Sangre de Cristo Mountains, and in summer move about with the availability of food, and move eastward to hunt buffalo. These groups used an area of some 5,000 to 7,000 square miles. *See generally* H.R. Rep. No. 2503 (1953). There was thus self-determination within the socio-religious-family relationships. This went with the small groups wherever they went as it had no geographical significance nor relationship to any other group. There were several small groups who farmed near Taos and Cimarron. For descriptive purposes the Spanish referred separately to the eastern groups, the Sand group, and the more western group. An eastern group leader was dealt with for a time in the pre-American period.

The Treaty of Guadalupe Hidalgo and the American occupation necessarily displaced all existing authority in the area, and there were then created the only governmental entities in New Mexico which were to exist during the interim period. Thus a new government came on the scene to supplant entirely the old. This was not an unfamiliar event in the history of the world.

Thus with the substitution of the government of the United States for the government of Mexico all the individuals in the area started anew with only their property. Thus there is nothing to build on in New Mexico to create a concept of sovereign power in any group remaining from Spanish or Mexican times. The start is from a zero base with the American occupation for all persons in the area. This new structure was established by the code promulgated by General Kearney in September of 1846. It was a complete code of laws and created the framework of the government with many details. Thus there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy pueblos. The Jicarilla Apaches had no such powers over others, and if they had any they would have been lost by the American occupation.

The act organizing the territory of New Mexico was effective in September of 1850 (9 Stat. 446). This was a skeleton of

organization and contained no mention of land ownership nor of the Indians. This was followed by the Enabling Act for the State of New Mexico (36 Stat. 557, Act of June 10, 1910). This Act contains the first reference to the Indians as a group. This Act recognized them only as landowners or possible landowners. The Act as to non-Indians provides in part that "people inhabiting said proposed state" disclaim all proprietary claims to the lands of the United States and of the Indians. The Act also acknowledges the exclusive jurisdiction in Congress over Indian lands. This disclaimer is by the "people" and only of *proprietary* interests. It has nothing to do with a disclaimer of sovereign power of the state, and again relates only to lands in an attempt to retain the status quo, and the rights under the Treaty of Guadalupe Hidalgo.

The Enabling Act, of course, contemplated the creation of a state under the United States Constitution with the vesting of broad powers in the new state. The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundation of governmental authority as it exists in the United States. Not only are there no federally created governmental entities within the states provided for by the Constitution, but it also does not contemplate the existence of other "nations" within the boundaries of the United States. Obviously there is no place for them in the governmental structure therein created.

It is significant in this respect that the Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, quoted from United States v. Kagama, 118 U.S. 375, the following:

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.' "

As to the Jicarillas, long after the American occupation legislation began to fill the vacuum as to their internal matters, their relation with the federal government and New Mexico, their money, and their tribal businesses, but all within Constitutional limitations. The place or location in New Mexico to be occupied by the Jicarillas after the American occupation changed several times. There were a series of executive orders promulgated and revoked. Finally, a location was established and the Executive Order recites that a described tract is "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." This is obviously something other than "ownership" but for our purposes it is no different from any other real estate "owned" by an individual or a group. It is no different from the Spanish and Mexican community land grants existing and recognized in New Mexico from the earliest times. These grants are also managed, used, and owned by groups in a community. The combination of land ownership and self-determination for anyone does not add up to anything more than the elements separately considered. The combination does not create a governmental agency or entity recognized or contemplated by the Constitutions of the United States or of New Mexico.

The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is as it should be for self-determination; however, such a group of tribal members

excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided authority exists to govern. Here we cannot add the exclusive group self-determination to land ownership and come out, as to the outsiders, with anything more than the rights of a private landowner. "Self-determination" for such an exclusive group is in substance what any socio-religious group has in this country, and should have. If such group owns a tract of land, there is the same combination of self-determination and private property which again adds up to private property as to non-members. This is typical of community land grants in New Mexico. The added element as to the Jicarillas is the control by Congress and the limited land "ownership." These for all practical purposes must be negative elements.

The plenary power of Congess over the Indians and their lands is obvious, but is must be recognized as a power "over the Indians" and not a power over non-Indians. The power of Congress over the Indians and their lands cannot include the exercise of such power to diminish the rights of non-Indians. To do so is to exercise plenary power over non-Indians. Thus Congress cannot under the Constitution add sufficient elements or powers to such an exclusive tribal group any more than it can to any other socio-religious group which would enable the members to exercise governmental powers of any nature in New Mexico.

The Secretary here urges that the Reorganization Act added some new ingredient of a governmental nature. Under the Constitution Congress cannot add new governmental entities in New Mexico not theretofore provided for. The federal government cannot by the Reorganization Act or by any other method introduce "nations" or governmental entities within the state. The Reorganization Act is an aspect of the current policy of the federal government seeking to cast self-determination machinery

in a form in which it is accustomed to, and which has a "governmental" appearance. The whole concept of self-determination should be taking place and should have been advanced in years past. All must agree that it is most desirable, and to be valid it must be recognized for what it really is — "self-determination."

It is a mistake to generalize about "Indian rights," wherever the groups may be in the United States, and to disregard the events in their history, in the history of the states where they may now be located, and the events and sequence of such events in the history of the United States. The differences are too great to permit the broad generalizations which are urged on this appeal by the Government or the basic assumptions made therein.

The State of New Mexico under specific federal statutes and under its sovereign powers has extensive jurisdiction within Indian reservations which it may choose to exercise or not to do so. The Supreme Court in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, considered and upheld the right of Washington State to control the netting of steelheads by individual Indians within the Puyallup Tribe's reservation. *See also* Kake Village v. Egan, 369 U.S. 60.

The Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, referred to the many instances where the Court has referred to the limited authority retained by Indian tribes. The Court therein refers to the "quasi-sovereign" reference in the Cherokee Nation v. Georgia, 5 Pet. 1, and then states:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'* " (Emphasis supplied.)

The Court refers therein to Johnson v. M'Intosh, 8 Wheat, 543, and states that:

> "We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States."

The Court continued:

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereinty of the United States as follows: '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*' " (Emphasis supplied.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, is a significant decision by the Supreme Court. It is, of course, directly concerned with the authority of an Indian tribe to exercise criminal authority over a nonmember. The decision, however, carries a parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all matters relating to nonmembers. We have above referred to portions of the opinion and the references to other Supreme Court opinions therein contained. The decision represents, together with United States v. Wheeler, 435 U.S. 313, a description of Indian "sovereignty" after all its restrictions and limitations are applied, as authority over members of the tribe. This is "self-determination"as it now exists. The Court in *Wheeler* said:

> "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a

> separate people, with the power of regulating their internal and social relations.' *United States* v. *Kagama, supra,* at 381-382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16."

In a footnote to the above, the Court added:

> "Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases,* 203 U.S. 76 *Roff* v. *Burney,* 168 U.S. 218, 222-223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U.S. 382; *cf. United States* v. *Quiver,* 241 U.S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U.S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100."

The Court in *Wheeler* continued:

> "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

And again:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

And again:

> "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its

> independence — its right to self government, by associating with a stronger, and taking its protection.' "

These quotations are especially significant when we consider the history of the Jicarillas, and the zero base from which they started into the American occupation. Even in United States v. Mazurie, 419 U.S. 544, the Court referred to the tribe there concerned as possessing "a certain degree of independent authority over matters that affect the internal and social relations of tribal life."

The two principal cases considered — *Oliphant* and *Wheeler* —, of course, concerned criminal jurisdiction, but again the reasoning and analysis upon which the decisions are based is equally applicable to other "jurisdiction" or "powers" over nonmembers which would originate with any concepts of governmental status or an aspect of sovereignty. *See also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. These several recent decisions, in my view, are determinative of the issue on appeal.

Thus under the most recent cases "Indian sovereignty," if it may be generalized, means self-determination. It means the right of the Jicarillas to control their internal business-governmental affairs relating to tribal members and, of course, their social and religious affairs. This is added to the usual rights which accompany the ownership of property both real and personal. These rights taken together do not include the taxation power here sought to be exercised. In contrast to the many license cases cited by the parties, if there is a license it is the executed oil and gas lease. The tribe is as any other landowner in relation to the lease for the purposes under consideration.

I would thus affirm the trial court.

Nos. 78-1154 and 78-1251

MERRION, et al v. JICARILLA APACHE TRIBE and ANDRUS, SECRETARY.

BARRETT, Circuit Judge, dissenting:

I.

In *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116, (10th Cir. 1979), we discussed the unique relationship between the United States Government and the Indian Tribes:

> Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. *Montoya* v. *United States,* 180 U.S. 261, 21 S.Ct. 358, 45 L.Ed. 521 (1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. *Native American Church.* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Circ. 1959).
>
> Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 23

S.Ct. 216 47 L.Ed. 299 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation* v. *County of Oneida, supra; United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).

It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

601 F.2d at pp. 1125, 1126.

In the exercise of the elusive concept of "tribal sovereignty", the courts have been able to readily define the limits thereof only if a federal statute or treaty speaks directly to the subject, i.e., the power of an Indian tribe to exercise a particular jurisdiction. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *Bryan* v. *Itasca County, Minnesota,* 426 U.S. 373 (1976). Thus, any general federal law fails if it conflicts with or abrogates a tribal treaty right. *United States* v. *Winnebago Tribe of Nebraska,* 542 F.2d 1002 (8th Cir. 1976). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Tribes do, however, retain those aspects of "sovereignty" not withdrawn. *United States* v. *Wheeler,* 435 U.S. 313 (1978).

Indian treaties have not been interpreted narrowly, but have been construed so as to generously recognize the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma* v. *United States,* 390 U.S. 468 (1968). Accordingly, all doubtful expressions contained in treaties should be resolved in the Indians' favor, *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), although

the Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. *Lone Wolf* v. *Hitchcock, supra.*

In the instant case there are no treaty rights involved, inasmuch as the Jicarilla Apache Tribe Reservation was carved out of the public domain and withdrawn by Executive order. A tribe occupying lands under a treaty has rights which are contractual in nature; however, a tribe occupying reservation lands by virtue of an Executive Order does so at the will of the Congress. Under either circumstance, i.e., creation of Indian reservations by treaty or Executive order, the exclusive plenary legislative authority of the Congress is superior *when exercised.* The "jurisdictional" problem relating to the applicable law of "Indian country" was discussed in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979).

> Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia*, 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 219-220.7. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 170-171.
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> 439 U.S. at pp. 470, 471.

The Congress, of course, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of

Indian tribes. *United States* v. *Wheeler, supra.* This power was articulated in *United States* v. *Mazurie*, 419 U.S. 544 (1975).

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936). Thus it is an important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations. . .," *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164, 173 (1973).
>
> . . . *[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.* [Emphasis supplied].
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> 419 U.S. at pp. 556, 557.

The Supreme Court has recognized that Indian Tribes have separate, distinct rights of self determination constituting them "quasi-sovereign tribal entities." *United States* v. *Wheeler, supra; Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). These rights flow from the historical recognition of tribal political independence in the context of tribal-federal relations first declared in *Worcester* v. *Georgia, supra*, which involved the applicability of certain statutes enacted by the State of Georgia relative to reservation lands of the Cherokee Tribe. The Court held that the State statutes were not enforceable. While recognizing that Indian tribes are independent political communities possessing attributes of sovereignty over both their

members and their territory, the Court nevertheless placed particular significance on the fact that the Constitution vested full control of Indian affairs in the Federal Government. In my view, the exclusivity of "control" indicated in *Worcester, supra,* was modified at least interpretive-wise, by subsequent Supreme Court decisions which recognized the power of the states in specific areas over Indians and reservation lands providing that the power exercised does not infringe on the tribal powers of self-government which are part of the doctrine of tribal sovereignty, and, thus, those "inherent powers of a limited sovereignty" referred to in *United States* v. *Wheeler, supra.*

Applying the foregoing test, I conclude that it is incumbent upon the courts, on a case-to-case basis, to carefully scrutinize the power to be exercised in terms of the intended purpose and the interest to be served. Neither treaties or statutes dealing with Indian affairs relate or "speak" to many of the "jurisdictional" conflicts which have surfaced.

If statutes and treaties provide clear guidance relative to Congressional intent, no further inquiry is required. Thus, in the very area of our inquiry here (the power of the Indian Tribes to tax non-members on the Reservation lands) there are decisions upholding tribal tax assessments authorized by treaties, statutes or agreements with the United States. In *Morris* v. *Hitchcock,* 194 U.S. 384 (1904), the Supreme Court upheld an act of the Chickasaw Nation imposing an annual per head privilege or permit tax on cattle and other animals owned by a non-Indian who was grazing animals under a lease on the Reservation lands. The Court specifically found the tax assessment to be authorized under both the terms of treaties entered into with the Five Civilized Tribes, and the Curtis Act. In *Buster* v. *Wright,* 135 F. 947 (8th Cir. 1905) the Court upheld a "permit tax" imposed by the Creek Indian Nation in the nature of a percentile levy on all goods offered for sale by non-member traders doing business on the Reservation lands. The Court relied upon *Morris* v.

Hitchcock, supra, and *Crabtree* v. *Madden,* 54 F. 426 (8th Cir. 1893) in upholding the tax, i.e., the existence of the power and authority granted the Tribe under treaties and acts. Even so, the court did opine that in the absence of an Act of Congress, treaty or agreement with the United States, the Creek Nation would be empowered to impose the tax as ". . . one of the inherent and essential attributes of its original sovereignty." In *Crabtree* v. *Madden, supra,* the Court upheld an annual license tax of $200.00 assessed by the Creek Nation against non-member traders doing business on the Reservation based upon the power and authority reserved to the Tribe under the Treaty of August 7, 1856, 11 Stat., p. 703, Art. 15, which granted the Creeks the unrestricted right of self-government with full jurisdiction over persons and property within their limits. The Treaty provided that all person not members of the Tribe were to be regarded as "intruders" subject to removal unless traveling through or "trading therein under license".

If, then, there are no treaties, statutes and agreements granting such power, the courts have been compelled to engage in the "balancing of interests" process. In this circumstance, the Supreme Court has recognized that non-Indians and their property interests within Indian reservations are subject to licensing enactments or ordinances. *United States* v. *Mazurie, supra,* involved the inherent power of the Tribe to grant or deny a liquor license to a non-Indian liquor dealer operating a retail business on non-Indian lands within the boundaries of the reservation. In like manner, tribal hunting and fishing licenses governing non-members who enter the reservations to hunt and fish have been grounded upon the inherent powers of the Tribe. *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976).

There are other areas where courts have been compelled to engage in the balancing of interest process. Thus, in *Puyallup Tribe, Inc.* v. *Washington Game Department,* 433 U.S. 165

(1977), the State of Washington's conservation regulations dealing with an allocation of the total number of steelhead fish which could be netted by the Indians on the waters flowing through reservation lands was upheld as a proper conservation measure and not as an attempt to allocate the number of fish which could be netted by the tribe. To the same effect is *Organized Village of Kake* v. *Egan, supra.* The Court there upheld the State of Alaska's prohibition against the Thlinget Indians' use of salmon traps on waters flowing through the incorporated communities, notwithstanding Alaska's disclaimer in its Alaska Statehood Act relating to Indians, to-wit: (a) disclaimer of right and title to Indian property, and (b) recognition that the United States retains "absolute jurisdiction and control" over right and title of Indian property. *Enriquez* v. *Superior Court,* 565 P.2d 522 (Ariz. Ct. App. 1977) held that a tribal court had jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the reservation.

The Supreme Court has dealt with the "balancing of interests" problem in very few decisions. In *Oliphant* v. *Suquamish Indian Tribe, supra,* the Court held that Indian tribes lack criminal jurisdiction over non-members in the absence of specific Congressional authorization. The Court observed, *interalia:*

> Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority . ." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished." *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574 (1823).
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> 435 U.S. at pp. 208, 209.

The Supreme Court, in *Organized Village of Kake* v. *Egan, supra,* following a review of a number of its prior decisions in this area of concern, observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
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> 369 U.S. at p. 75.

The problems generated by the issue of the "exclusiveness" of federal jurisdiction were highlighted by this language contained in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973).

> . . . The upshot [of more individuality in treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken together, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake, supra* at 75; *Williams* v. *Lee,* 358 U.S. 217 (1959); *New York, ex. rel. Ray* v. *Martin,* 326 U.S. 496, 499 (1946); *Draper* v. *United States,* 164 U.S. 240 (1896).
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> 411 U.S. at p. 148.
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> *See also: United States* v. *Mazurie, supra.*

I would hold that the District Court did not err in finding that the Tribe's sovereign status does not extend to or allow the imposition of the challenged Tribal Severance Tax. In my view, the power of the Tribe to impose such a tax in these consolidated cases is clearly a political question which has not been explicitly addressed by the Congress. If the Congress intends that such power exists, it is incumbent that legislation be enacted explicitly so declaring. Until or unless the Congress affirmatively acts, I would hold that Tribe does not possess the right, power and authority to enforce the collection of its Tribal Severance Tax. My research discloses only two opinions which recognize the

inherent power of an Indian tribe to enact and enforce a tribal ordinance assessing a tax upon a non-Indian's income from business conducted within reservation boundaries. *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). I decline to adopt the broad interpretation of inherent tribal sovereignty — power laid down in these opinions, and adopted by the majority here.

A significant aspect of the issue before us here involves recognition that the United States Government, as guardian, has enacted much legislation and appropriated significant amounts of federal funds for the direct, specific and exclusive benefit of its Indian wards. In like manner, the various states wherein the tribes reside have rendered state governmental aid and assistance in many important areas, utmost of which is perhaps the maintenance of the public schools. To what extent the Congress intends its beneficial enactments and appropriations to serve as exclusive means, I do not know. It is, however, my view that this involves a legislative judgment in the nature of a political question. The question of what involves "essential tribal relations" referred to in *Williams* v. *Lee, supra,* is, in my judgment a political question.

In positing the "inherent sovereignty" issues presented here as a political question for Congressional determination, we recognize that the United States Government, out of avowed solicitude for the welfare of its Indian wards who were considered ". . . a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith," *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912), undertook by treaties, statutes and executive orders to establish legal relations between the United States Government and the Indian Tribes which ". . . resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). Implicit in the relationship thus created, in terms of "ownership"

of the property set aside for the use, occupancy and benefit of the Indian tribes, is the fact that legal title, with its attendant aspect of dominion and ultimate control, vests in the United States, as guardian, with the right of use, benefit and occupancy vesting in the Indian wards. That relationship between the United States Government and the various Indian tribes, however, was never intended to be one of Indian servitude. Thus, the Supreme Court has held that the power of Congress over Indian affairs, though plenary in nature, is not absolute and that the standard of review recently applied is that legislative judgments should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).

The "Indian Sovereignty" doctrine cannot be equated with governmental sovereignty of the United States Government. It is, however, of a "unique and limited character" existing at the sufferance of Congress and subject to complete defeasance. *United States* v. *Wheeler, supra*, at p. 323. Tribal self government is rooted in the current federal policy of promoting tribal self-government, *Bryan* v. *Itasca County, Minnesota, supra*, which advances the social, institutional, political and cultural values peculiar to the respective tribes. The basic right of Indian internal self-government is directed to their right "of regulating their internal and social relations," out of recognition of their "semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *United States* v. *Kagama*, 118 U.S. 375, 381 (1886).

II.

In the context of the above analysis of the current federal policy, I now consider the status of Congressional judgment in the area of the challenged Tribal Severance Tax in weighing the

preemption contention against the claim of inherent tribal sovereignty. If the Congress has explicitly addressed the subject matter, obviously there is no need for this Court to engage in the "balancing of interests" determination.

In my view, just as found by the District Court, there is clear congressional intent controlling in this case. I would hold that the enactment by the Congress on March 3, 1927, of 25 U.S.C.A. § 398c., 44 Stat. 1347, constituted clear, unambiguous legislative intent that only a "state or local authority" is empowered to levy and collect taxes upon the production from oil and gas wells produced and saved *"upon lands within Executive order Indian reservations."* That statute imposes one restriction only, i.e., that such taxes may not become a lien against Indian lands or property. The statute reads in full as follows:

§ 398c. Same; taxes

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Tribe and the Secretary of the Interior contend that 25 U.S.C.'s § 398c. does not pertain or control. They argue, first, that Tribe, as an element of its sovereign status, is empowered to enact and enforce its severance tax ordinance and, second, that the Congressional enactment on May 11, 1938, of 25 U.S.C.A. § 396a. specifically governs the subject leases (and production therefrom) and does not permit state taxation of oil and gas

produced within the Tribe's reservation. That statute reads as follows:

> § 396a. Leases of unallotted lands for mining purposes; duration of leases.
>
> On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198 § 1, 52 Stat. 437.

I cannot accept the contentions of Tribe and the Secretary, with full recognition of the rule that limitations on tribal self-government cannot be implied from a statute or treaty but must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history. *Bryan* v. *Itasca County, Minnesota, supra; Morton* v. *Mancari, supra.* My review of the legislative history of 25 U.S.C.A. 398(c) convinces me that the Congress did intend to grant States and local authorities the *exclusive* authority to tax non-Indian oil and gas lessees on production realized from their oil and gas operations conducted on Executive order Indian reservation lands. It has been held that Indian tribes are not "states". *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe, supra.* The Congressional discussions and debates relating to this legislation concentrated on the fact that Executive order reservation lands were not in the same category as those lands set aside under treaty to a tribe which "gave up" or "surrendered" ancestral or aboriginal rights in exchange therefor, but were, instead, simply set aside as a "gratuity" to the tribes from the United States. In the sense of the "balancing of interests" process, the Congress compromised the competing interests of the States and the tribes by authorizing the tribes to

retain all of the royalties paid under the operating leases and the States to impose taxes on the production of oil and gas. (H. Rept. No. 1791, 69th Cong., 2nd Sess., 69 Cong. Rec. 4580 (1927)). *See also:* (S.B. 876, 68th Cong., 2nd Sess., 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2234 (1925); 67 Cong. Rec. 10915 (1926).

I would reject Appellants' argument that the 1938 enactment of the Indian Mineral Leasing Act, 25 U.S.C.A. § 396(a), *et seq.*, repeals 25 U.S.C.A. 398(c). Although cognizant that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and that doubtful expressions are to be resolved in favor of the Indians, *Morton* v. *Mancari, supra*, I would hold that because nothing in the Mineral Leasing Act of 1938 speaks to the subject of taxation of oil and gas produced from Indian lands and certainly nothing relating to Executive order reservation lands, there is lacking that required "clear intention" of provisions contained in a general statute necessary to effect repeal of or nullify the express terms of a specific statute, (25 U.S.C.A., 398c.), regardless of the priority of enactment. *Morton* v. *Mancari, supra; Colorado River Water Cons. Dist.* v. *United States*, 424 U.S. 800 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Jicarilla Apache Tribe* v. *United States, supra; Glover Construction Company* v. *Andrus*, 591 F.2d 554 (10th Cir. 1979); Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05. Statutes must be construed as intended by the drafters when enacted in the light of conditions as they existed. *United States* v. *Stewart*, 311 U.S. 60 (1940).

In addition to reliance on repeal by implication of 25 U.S.C.A. § 398c. by enactment of 25 U.S.C.A. § 396(a), *et seq.*, Tribe further relies on the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. §§ 476-477.

In accordance with the Indian Reorganization Act, Tribe adopted a revised Constitution on December 23, 1968, subsequently approved by the Undersecretary of the Interior. The

revised Constitution organized the tribal government into the tripartite departments of legislative, executive and judicial. The principal governing body is the tribal council consisting of elected members of the Tribe. Pertinent portions of the Tribe's revised Constitution are:

Article XI, Section 1 provides:

> The *inherent powers* of the Jicarilla Apache Tribe, *including* those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. [Emphasis supplied].

Subparagraph (e) of Section 1, Article 10, provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-menbers of the tribe doing business on the reservation.

Section 2 of Article 10 establishes the procedures for approval of tribal ordinances, which, in substance, provides that ordinances enacted be presented to the Superintendent, Bureau of Indian Affairs, Jicarilla Apache Agency, within ten days after approval by the Council, and that the Superintendent shall within ten days following receipt by him, transmit it to the Secretary of the Interior with his recommendation. The enactment becomes effective when approved by the Secretary, or if he does not act within 120 days following submittal to him. It was under authority thereof that the tribal council of Tribe on July 9, 1976, enacted its Oil and Gas Severance Tax Ordinance and further enacted a Severance Tax Permanent Fund Ordinance. These ordinances were subsequently approved by the Secretary of the Interior's delegate. The Tribal Severance Tax is expressly imposed on "any oil and natural gas severed, saved and removed

from Tribal lands". The *measure* of the tax is 5 cents per million BTU of gas and 29 cents per barrel of crude oil or condensate produced on the Reservation and *"sold or transported off the reservation"*. All oil, gas or condensate representing [reserved] royalty gas "taken by the Tribe in kind and used by the Tribe", *is exempt from the tax.*

Tribe does not — and cannot — point to any specific language in the Indian Reorganization Act of 1934 authorizing or empowering it to tax. In lieu of any such specific, clear language, Tribe relies upon (a) the stated purpose of the Act, i.e., freedom to organize for purposes of self-government and economic enterprise, and (b) an opinion rendered by the Solicitor to the Secretary of the Interior in 1934, identified as 55 I.D. 14, setting forth the purported intentions of Congress in enacting Section 16 of the Act. The opinion reads in part as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.
>
> * * *
>
> I conclude that under Section 16 of the Wheeler-Howard Act (Public No. 383, 73rd Congress) the "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
>
> * * *
>
> 5. To levy dues, fees, or taxes upon the members of the tribe and upon non-members residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

Tribe contends that the Solicitor's opinion, rendered the same year the Act became effective, is the "best indication of Congressional intent available", citing to *Squire* v. *Capoeman*, 351 U.S. 1 (1956). [Brief of Tribe, In Chief, p. 24]. A careful examination of the exact language employed by the Court in *Squire* v. *Capoeman, supra,* is simply that "These relatively contemporaneous official and unofficial writings are entitled to consideration." 351 U.S. at p. 9. I have considered them and find them wanting.

The only express language contained in the 1934 Act vesting rights and powers in a tribe or its tribal council, if organized under the terms of the Act is: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.* 25 U.S.C.A. § 476. The only conceivable language expressed in the § 476, *supra,* which the Solicitor's Opinion 55 I.D. 14 could have relied upon to "make the case" is that authorizing the various Indian tribes to organize under the Act "for its common welfare" and to adopt an appropriate constitution and bylaws". Any reliance thereon, as support of Tribe's contention that the Act effectively repealed 25 U.S.C. § 398c., *supra,* is misplaced.

My interpretation of the interplay between these conflicting contentions is, I believe, in accord with a detailed analysis of a similar conflict set forth in *Fort Mojave Tribe* v. *San Bernardino County,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1976). In that case, California exercised civil and criminal jurisdiction over Indian country within its borders [but specifically exempted taxation of any real or personal property belonging to any Indian or Indian Tribe] authorized under 28 U.S.C. § 1360(b). The court pertinently observed:

While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect the legal incidence of the tax clearly falls on the lessee[3] The lessor will never be personally liable for any delinquent taxes arising under this taxing statute . . . Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset."

Our conclusion is buttressed by the Supreme Court's decision in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L.Ed.2d 114 (1973). There the Court relying on the statement that section 476 of the Act [The Indian Reorganization Act of 1934] was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong.Rec. 11732, found that traditional tax immunities had neither been expanded nor reduced by the Act. *Mescalero, supra* at 153-54 n.9, 93 S.Ct. 1267. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundries of their reservation. We *follow that lead here and refuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat.*

* * *

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. *Bryan* v. *Itasca County,*

supra, forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although *McClanahan, supra,* held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan, supra* at 411 U.S. 168, 93 S.Ct. at 1260. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. *McClanahan, supra* at 179, 93 S.Ct. 1257. Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. . . *To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question.* [Footnote omitted]. [Emphasis supplied].

543 F.2d at pp. 1256, 1257.

I observe that in the case at bar a holding that the New Mexico State taxes levied against the proceeds of oil and gas produced by lessee Operators from Tribe's Reservation lands are valid based upon the express Congressional "signal" authorizing same, i.e., 25 U.S.C. § 398(c), avoids any risk of permitting its imposition absent such clear Congressional consent. The Congress has expressly provided that the taxing laws of the various states extend over and apply to proceeds realized by non-Indian Operators from mineral exploration conducted on Executive Order Reservation lands. It is this power the court recognized in *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965).

In its Reply Brief and Additional Brief filed prior to oral argument, Tribe relies upon the Natural Gas Act of 1978, 15 U.S.C. §§ 3301, *et seq.*, as express Congressional recognition of tribal authority to impose severance taxes on natural gas. 15 U.S.C. § 3320(c) defines, for purposes of the Act, "State Severance Tax" as any "severance production, or similar tax . . . imposed on the production of natural gas . . . by any State or Indian Tribe." Tribe acknowledges that the conference report statement clearly shows that the Congressional conferees did not intend thereby to prejudge the outcome of cases then on appeal to this Court respecting the power of Indian tribes to impose taxes on non-Indians engaged in business activities on Indian reservations. In any event, I would hold that nothing in the language of the Natural Gas Act of 1978 can be interpreted as a Congressional grant of power to Indian tribes to enact and levy tribal severance taxes. The language is not, either expressly or impliedly, an affirmative grant of such power of taxation to Indian tribes.

III.

I would hold that the District Court did not err in concluding that the Tribe's Severance Tax levied only against oil, gas or condensate produced on the Reservation and sold or transported off the Reservation is an unlawful multiple burden on and discriminatory against interstate commerce.

Tribe and Secretary contend that the severance tax ordinance is not in conflict with the commerce clause because the precise "triggering" event here is entirely "local" in nature, i.e., the tax is imposed on oil and gas when severed, saved and removed from tribal lands. From thence, it is contended that the eventual entry of oil and gas taxed locally upon severance from tribal property into interstate commerce outside of New Mexico does not thereby invalidate the tax. Thus, Tribe and Secretary, in effect, contend that the Tribe's tax is "insulated" by reason of the local nature of its application.

The record reflects that all of the gas provided by Appellee Marathon from Tribe reservation lands is sold in interstate commerce. [R., Vol. VI, p. 240]. Some sixty percent of the production realized by Appellee Amoco is sold in interstate commerce. [R., Vol. VI, p. 229]. Thus, inasmuch as the tax is not designed to apply until the oil and gas produced is "sold or transported off the reservation", I would hold that the incidence bears directly and discriminately against interstate commerce. *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450 (1959); *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939); *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1938). A tax imposed on local activity related to interstate commerce is valid only if the local activity is not such an integral part of interstate process, the flow of commerce, that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954). There a Texas tax on the occupation of "gathering gas", measured by the entire volume of gas "taken", as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, was held invalid under the Commerce Clause. The Commerce Clause is offended when, as here, the tax, by its very nature, makes interstate commerce bear more than its fair share. *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948).

The Supreme Court has consistently struck down state laws which discriminately benefit [or may discriminately benefit] local or intrastate commerce at the expense of out-of-state or interstate commerce. In *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) the Court held that the Commerce Clause protects the interstate market, and not particular firms from prohibitive regulations. Under this rationale, the Court observed

that a state law does not discriminate against interstate commerce if it leaves the in-state and out-of-state businesses participating in the market on an equal competitive footing. In relation to the instant case, those businesses engaged in exclusive *intrastate* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving in *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing.

In *Boston Stock Exchange* v. *State Tax Comm'n.*, 429 U.S. 318 (1977), the Supreme Court stated:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g., Freeman* v. *Hewit, supra*, at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.*, at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily*, 373 U.S. 64 (1963); *Nippert* v. *Richmond*, 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908); *Guy* v. *Baltimore*, 100 U.S.

434, 443 (1880); *Wellon* v. *Missouri*, 91 U.S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951).

429 U.S. at p. 329.

I would affirm the District Court.

ORDER,
COURT OF APPEALS FOR THE TENTH CIRCUIT
AMENDING OPINION AND DENYING REHEARING

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Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing, entered April 25, 1980.

MARCH TERM — April 25, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges.

No. 78-1154

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY AND GULF OIL CORPORATION,

Plaintiffs-Appellees,

VS.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendents Appellants,

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,

Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,

Plaintiffs-Appellees,

VS.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cases.

Upon consideration whereof, it is ordered:

1. Page 6 of the opinion filed February 22, 1980, is recalled and vacated, and a substitute page 6 is published and inserted in its place.

2. The petition for rehearing is denied. Chief Judge Seth and Circuit Judge Barrett voted to grant rehearing. Circuit Judge Seymour, who was not a member of the Court at the time of submission, did not participate.

3. Jicarilla Apache Tribe is granted leave to file its verified bill of costs out of time. The Court has considered the objection to the bill of costs filed by appellees. The Clerk shall issue a statement of costs in favor of appellant Jicarilla Apache Tribe in the sum of $993.51.

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: Nos. 78-1154 and 78-1251, Merrion, et al, v. Jicarilla Apache Tribe, et al

Enclosed is a new page 6 to be substituted for page 6 in the original opinion, which was filed February 22, 1980.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP/dve

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. §702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe

[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

ORDERS,
SUPREME COURT OF THE UNITED STATES
CONSOLIDATING 80-11 AND 80-15,
AND GRANTING CERTIORARI

Supreme Court of the United States

No. 80-11

J. GREGORY MERRION AND
ROBERT L. BAYLESS, ETC., ET AL.,
Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

The case is consolidated with No. 80-15 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision of this petition.

Supreme Court of the United States

No. 80-15

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY,

Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

The case is consolidated with No. 80-11 and a total of one hour is allotted for oral argument.

Mr. Justice Stewart took no part in the consideration or decision.

MICHAEL RODAK, JR.

Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

and

AMOCO PRODUCTION COMPANY, and MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,
Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

APPENDICES TO BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

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APPENDIX A

Testimony of Richard TeCube
On Direct Examination,
Rec. Vol. VI; pp. 253-266.

RECORD ON APPEAL
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1154

J. GREGORY MERRION, et al.,)
)
Appellee,)
)
vs.)
)
JICARILLA APACHE TRIBE, et al.,)
)
Appellants.)

Appeal from the United States District Court
For the District of New Mexico

VOLUME VI
AUGUST 29, 1977

RICHARD TECUBE

was called as a witness by the defendants, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. NORDHAUS:

Q: Will you state your name, please? A: My name is Richard TeCube.

THE COURT: How do you spell that? A: T-e-C-u-b-e.

THE COURT: T-e-C-u-b-e? A: Right, that's correct.

Q: It is capital--it is Te-, capital C, isn't it? A: That's correct.

THE COURT: Well, now, just -- wait a minute. Let me get this name down right. I had it all wrong. I will rub it out and start over. Richard T.? MR. NORDHAUS: T.

Q: Are you an enrolled member of the Jicarilla Apache Tribe? A: Yes, I am.

Q: Are you a member of the Jicarilla Apache Council? A: Yes, I am.

Q: How long have you been on the council? A: I am starting my fourth year. It is a four-year term so I have been on three years.

THE CLERK: Sir, could you speak up, please?

Q: Will you speak up. Could you get closer to the mike? A: I have been on the council three years.

Q: Three years.

THE COURT: Well, now, let's see. I have four down here. Just three? A: Three years.

Q: Will you state what your regular employment is other than being a member of the tribal council? A: I work for the tribe as economic development planner.

Q: How long have you been the econnomic development planner?

A: I have been the plannner for four years.

Q: What is you education, college and graduate school, if any? A: I have a Bachelor of Science degree from Colorado State University in Fort Collins.

THE COURT: I can't understand you.

Q: You will have to talk a little slower, Richard, and a little -- make it --

THE COURT: Can you talk so I understand you? A: Yes, sir, I can.

THE COURT: Well, I am afraid that thing might be worse than him just talking. I don't know. It may be, it might not.

THE CLERK: I will turn it off, sir.

Q: Talk a little slower and -- if you can, Mr. TeCube. A: Well, would you repeat the question, please?

Q: Yes. What is you education? A: My education is that I have a college degree from Colorado State Univesity, and I also have done a years graduate work at the University of Washington in Seattle.

Q: What was your field of graduate study? A: My field of graduate study was in public administration.

Q: What are your responsibilities as economic development planner, if you can outline those? A: Again, on my job entails plannning in the general area of economic development which is divided into business development, industrial development, natural resource development, human resource development, and community development.

Q: Have you, as a councilman and as economic development planner, studied the Tribe's present and the future requirements regarding the use of its resources? A: Yes, I have.

Q: What kind of studies have you made with respect to its oil and gas resources and the use of those resources?

MR. COONEY: May it please the Court, Your Honor, we are going to object to this testimony. I don't see what relevance the Tribe's plans for use of its resources have to do with the validity under the law of the oil and gas severance tax.

THE COURT: Yes. What is the purpose of this, counselor?

MR. NORDHAUS: Your Honor, we are demonstrating the need of the Tribe.

THE COURT: The need for the tax?

MR. NORDHAUS: The need for the tax, yeah.

THE COURT: Well, that isn't the question.

MR. NORDHAUS: And we are also -- well, Your

Honor, it is a question of what is the -- what is the regulation -- the reasonableness of the tax in relation to its burden on commerce and the need of the taxing government for the revenues.

THE COURT: Well, I don't think that that's relevant, what the need is. Why don't you make your offer of proof here so you will have it in the record.

MR. NORDHAUS: We will expect to show by this witness that the Tribe has made a long-range study of its needs for development of resources, its needs for development of revenues to support tribal operations, its needs for creating employment on the reservation. We will tender proof to show a very low per capita income, a very high unemployment rate, an effort by the Tribe to utilize the resources, to improve the condition of Tribe members over a long period of time, to provide education for Tribal members, to provide employment, to provide social services, and that -- there will be a requirement to use its royalty income for industrial uses.

We will show that the Tribe has in litigation with two major pipeline companies, has secured agreements to transport its royalty gas where needed on the reservation for use by the tribal govenment for industry, for agriculture, that in connection with the use of the royalty gas, the Tribal revenues will be depleted because the royalty gas is a main source of tribal income, the royalties obtained from gas. It supports the Tribe, it supports all the government activities of the Tribe, the royalties we will show, will decrease as the Tribe's oil and gas resources are depleted, that to replace this royalty income, the Tribe will require other substantial income, that as a local -- as a viable government, it is entitled to tax, that it will need the tax revenue, that the severance --

THE COURT: Now, when you say "entitled to tax", that's something else, again. And I don't want to --

MR. NORDHAUS: Well, what I am saying is assuming that we will -- we will say, assuming that the Tribe is entitled to tax, the Tribe will need that tax.

THE COURT: Well, that's all right. I didn't -- from what you said, why you said that the Tribe is entitled to tax.

MR. NORDHAUS: All right. I will say, assuming the Tribe is entitled to tax --

THE COURT: Yes. That is different.

MR. NORDHAUS: The Tribe is -- it will need the tax to -- in the future to protect its income and to provide in the future the governmental services it provides now, and I will cite *Parker against Brown*, 315 U.S. 341, that it is a reasonable --

THE COURT: Just a minute. Let me get that down. 315 --

MR. NORDHAUS: 317 U.S. --

THE COURT: I thought you said 315. 317?

MR. NORDHAUS: 317 U.S. 341, Parker against Brown, that this severance tax is a reasonable governmental means to a reasonable end, and this whole line of testimony will show that it is a -- not only a reasonable means to the reasonable end which is preservation of the economy and the -- really the survival of the Tribe by providing the revenue which will be gone when the royalties are gone.

We will show that the tribal gas production has diminished, has decreased from around fifty-five thousand in '72 or '73 to thirty-five -- excuse me -- fifty-five million m.c.f. in 1972 to thirty-five million m.c.f. in 1975.

It increased in '76 because of increased drilling, but the eventual cessation of production in the next thirty or forty years is inevitable.

Therefore, we will show that it is necessary for the preservation of the Tribe to exact this tax. We will show that it is reasonable to -- for the Tribe to levy this tax, put it into a permanent fund, and at the end of the twenty-five or thirty years, the income from this permanent fund will supply the revenues that will replace the royalties now received.

The State of New Mexico has the same provision in its permanent fund to provide for its eventual depletion of resources, and diminution of royalties. In that respect, the evidence will show as a background the economy of the Tribe, the -- as I say, the very low per capita income, the high rate of unemployment, the need for industry on the reservation which will be provided by the royalty gas which, in turn, will diminish tribal revenues.

It will also show that this gas and oil production is all transported off the reservation prior to use, that the contention of the plaintiffs that this tax is discriminatory because the exempt gas used on the reservation, is not a reasonable objection because all oil and gas is transported off the reservation, the gas has to be transported off the reservation for processing to make it suitable for use in industry or in the home. Oil has to be transported off the reservation prior to use for processing in a refinery. This testimony will show that the exemption in the ordinance is prospectively to exempt royalty gas used by the tribal government for tribal purposes, similar to exemption of state -- of state property which is used by the state government.

We will show there is no instance where gas or oil is produced and not transported off the reservation. We will show, therefore, the exemption is not discriminatory. That in general, is what we expect to prove by this witness, and we submit that it is entirely relevant to the -- to establish the Tribe's -- the reasonableness as a tax under *Parker vs. Brown.*

There is another aspect of this, Your Honor. Under the Fiscal Assistance Act of 1976 -- that's 90 Statutes, 499, which is the revenue sharing act.

THE COURT: What is the citation in the U.S.C.A.?

MR. NORDHAUS: I don't have the U.S.C.A. citation. I will get that for you, Your Honor.

THE COURT: You see, I don't have what you are talking about there.

MR. NORDHAUS: It is the revenue sharing act, and I don't know whether it is codified yet.

THE COURT: You don't know what?

MR. NORDHAUS: I don't know whether it is codified yet. It is the '76 act. It is 90 Statutes, 1499, and these -- all of these revenue sharing acts define Indian governments as a local government entitled to participate in revenue sharing, and one of the criteria for this sharing, one of the qualifications is the generation by these local governments of tax revenue.

The more tax revenues local governments generate themselves, the more revenue sharing funds they are entitled to. So we -- in the course of this we have to show the Court and show -- and put in the record the generation of tax funds and the reason for generation of tax funds.

I don't have anymore to say, Your Honor.

THE COURT: Well, you have made your record and I will deny any of the evidence. There was only one thing in your argument that I didn't know whether should be gone into and that is as a matter of exemptions.

MR. COONEY: Your Honor, we would submit that the ordinance speaks for itself on that, and the instructions issued to the operators speak for themselves, and this witness isn't qualified to render a legal opinion to the Court as to what the ordinance really means about exemptions.

THE COURT: I think you are right on that. All right. Proceed.

MR. NORDHAUS: Is Your Honor going to let me question this witness?

THE COURT: Not on this matter you have mentioned. I had you make an offer of proof and that's denied.

If there's something else, why --

Q: Mr. TeCube, is all of the oil and gas produced on the reservation transported off the reservation prior to use except for that oil and gas used by lessees in their

production and development operations? A: This is correct at the present time.

Q: Where does the gas for tribal use come from, natural gas? A: We buy our natural gas from a pipeline company. I believe it is owned by Gas Company of New Mexico. They have a franchise agreement whereby they serve the community.

Q: That gas -- that pipeline comes from off the reservation, is that not correct? A: That's correct.

Q: Mr. TeCube, to your knowledge, does the State of New Mexico provide any substantial services to the Jicarilla Apache Tribe?

MR. BLACK: Your Honor, I am going to object to this. I don't know first of all what substantial services are, or this witness' background to say what the State gives to the Tribe. But I don't see what the significance of the State giving them any service has to do with an invalid tax or a valid tax. If the tax is invalid, then it doesn't make any difference.

THE COURT: Well, I will let him answer and then we will -- I will decide.

MR. NORDHAUS: One of the contested issues of fact is whether --

THE COURT: Well, I have already ruled in your favor. Do you want me to change my ruling?

MR. NORDHAUS: No, no, sir.

THE COURT: Well, go ahead.

Q: Do you know what, if any services, the State provides on the Jicarilla Apache Reservation? A: They provide very little service to the best of my knowledge. They provide some educational service to the public school system and they provide -- maintain a police -- patrolman there, but they deal more with nonIndians than Indians and they do maintain a State Highway Department which also includes the reservation and nonreservation portion of the state roads on the reservation.

MR. COONEY: Your Honor, I would move to strike that as nonresponsive. What he gave us was not a description of the services, but his opinion that they are not very good.

THE COURT: Well, I will let it stay in. He said the public schools and highways.

Q: Do you have a game and fish operation on the reservation? A: By the way of tribal game and fish department.

Q: Does the State of New Mexico provide any services with respect to the tribal game and fish operation? A: Yes. To a small degree, I think we have an annual arrangement for -- we have the use of a helicopter to count wildlife on the reservation, primarily deer and elk.

Q: Do you know whether the state stocks game or fish on the reservation? A: No, we [sic] don't.

Q: Does the Tribe, if you know, collect state game and fish license fees? A: Yes. This is a requirement we have for every hunter who comes on to the reservation must possess also a state license.

Q: Does the Tribe have its own license and hunting and fishing fees? A: Yes, we do.

Q: Do you know, and tell me -- state if you know, what those fees are for various game and fish. A: I don't know what that is. There's several different taxes or fees.

THE COURT: I guess it depended on whether you are hunting elk or whether you are hunting deer.

MR. NORDHAUS: Well, I asked him for the different types of game.

THE COURT: Yes.

Q: Does the State of New Mexico provide police services on the reservation? A: Well, as I have stated previous, they have a patrolman located in Dulce, and he deals -- he patrols the state roads, and works with nonIndian offenses.

Q: NonIndian offenses on the state road? A: (Witness nods head.)

Q: You have -- how many state roads do you have running through the reservation? A: We have two state roads.

Q: What are they? A: State Highway 44 and State Road 537.

Q: State Road 44 runs from Cuba to Farmington, is that correct? A: That's correct.

Q: And where does five thirty-seven go? A: Five thirty-seven connects State Highway 44 at the south end with U.S. Highway 84 on the north half.

Q: All right. Runs generally through the reservation? A: Yes.

Q: Who built the north-south road five thirty-seven? A: The Bureau of Indian Affairs constructed five thirty-seven.

Q: And then that was -- what --- was that turned over to the state? A: Yes, it was.

Q: Does the Jicarilla Apache Tribe --

THE COURT: Just a minute, now. I think you said the Bureau of Indian Affairs. That wasn't the Tribe? That was the United States, wasn't it? A: Yes, that is an agency of the federal government.

THE COURT: Yes.

Q: Does the Tribe itself provide road maintenance? A: Yes, the Tribe has a tribal road department.

Q: Is that budgeted out of the tribal funds? A: That's correct.

Q: The Tribe -- then advise the Court whether or not the Tribe maintains a police department and whether or not that is paid out of tribal funds?

MR. BLACK: Your Honor, I think we are getting

into exactly the areas Mr. Nordhaus offered. If the Court wishes to hear them, we don't object, but --

THE COURT: Well --

MR. BLACK: -- again --

THE COURT: Well, if you are getting into what the money is used for, why, I am going to sustain the objection. Is that what you wanted to do?

Appendix B

Report of Dr. Alfred L. Parker,
The Economic Impact of a Proposed Oil and Natural Gas Severance Tax, July 1976.
Defendant's Exhibit N,
Book of Exhibits, CCA 10th.

The Economic Impact of a Proposed Oil and Natural Gas Severance Tax
July, 1976

The analysis presented below is to indicate the impact on Jicarilla tax revenues and on intrastate and interstate consumers of a proposed severance tax on oil and natural gas produced from Jicarilla leases. The analysis is presented under these general headings: purpose of the proposed tax, oil and natural gas severance tax to be levied, tax revenue generated by the tax, impact of the proposed severance tax, and summary.

Purpose of the Proposed Tax

Oil and natural gas production from Jicarilla leases represent the export of important nonrenewable resources of the Jicarilla Apache Nation. The royalties derived from oil and gas production are clearly an important source of financial support for the Tribe. Table 1 provides a summary of royalties obtained from oil and natural gas in the period 1970-1975.

Tribal royalties have been artifically depressed as a result of federal government control of oil and natural gas wellhead prices. The Federal Power Commission policy of maintaining the wellhead price of interstate natural gas significantly below market value and Federal Energy Administration control of the price of "old oil" have resulted in significantly lower royalty revenues for the Tribe.

Table 1

Jicarilla Oil and Natural Gas Royalties
1970-1975

	Oil Royalties	Natural Gas Royalties
1970	$283,877	$1,038,877
1971	262,978	944,684
1972	293,123	1,240,091
1973	252,670	1,299,251
1974	609,841	1,763,181
1975	414,960	1,583,158

Source: Data supplied by U.S.G.S. Roswell, New Mexico.

It is clearly important that the Tribe not permit its nonrenewable resources to be depleted without providing for the welfare of future generations. This can perhaps best be achieved through the development of a "permanent fund". This permanent fund to provide financial security and financial support for the Jicarilla Apache Nation in the future.

It is anticipated that a significant portion of the revenue to be collected from the proposed severance tax will be placed in such a permanent fund. Current royalty payments are not sufficient, because of the artificially depressed prices of oil and natural gas, to meet current financial requirements and contribute at same time to the development of this permanent fund.

The Jicarilla Apache Nation has experienced and it is expected will continue to experience significant administrative costs directly related to leasing, supervision and other administrative activity associated with the development and operation of their oil and natural gas resources. A portion of the revenue from the proposed severance tax would be used to cover these administrative costs.

Oil and Natural Gas Severance Tax to be Levied

The proposed severance tax would establish a tax on the nonrenewable energy resources of the Jicarilla Apache Nation of approximately 5¢ per MMBtu. Operators of

natural gas leases are now required to measure and report the Btu content of natural gas extracted from Jicarilla leases. The availability of this Btu data would make the calculation of required tax payments a very simple process.

Oil and Natural Gas Severance Tax

Product	*Tax Rate*
Natural Gas	5¢ per MMBtu
Crude Oil	29¢ per barrel

Accurate data on the Btu content of crude oil is not so readily available. For this reason, the rate on crude oil has been set at 29¢ per barrel. In setting the rate, it is assumed that crude oil contains 5.8 million Btu per barrel. (Mineral Industry Survey of the U.S. Department of the Interior, Bureau of Mines dated December 1975 reports that the average Btu content of crude petroleum produced in the United States was 5,800,000/barrel for the years 1970 through 1975.) At 5¢ per MMBtu this would be a tax of 29¢ per barrel.

Tax Revenue Generated by the Tax

Estimates of the tax revenue that would be generated by the proposed severance tax are based on U.S.G.S. Roswell, New Mexico production data for 1975. Using an estimate of 1164 Btu per cubic foot of natural gas, approximately 41,903,367 MMBtu were produced from Jicarilla leases. Thus, the proposed severance tax on natural gas would generate an additional $2,095,168 in tax revenue for the Jicarilla Apache Nation.

1975 Production

Natural Gas

35,999,456 Mcf
× 1164 Btu

41,903,367 MMBtu × 5¢ per MMBtu = $2,095,168

Crude Oil

411,884 Barrels × 29¢ per barrel = 119,446

Total Revenue $2,214,614

The U.S.G.S. Roswell, New Mexico reports that 411,-

884 barrels of crude oil were produced in 1975 from Jicarilla leases. The proposed severance tax would, based on 1975 production, generate $119,446 in additional tax revenue for the Jicarilla Apache Nation.

The proposed severance tax would thus generate a total of approximately $2,214,624 in additional revenue a substantial portion of which would be placed in a permanent fund and the remainder used to cover administrative costs associated with the development and operation of tribal oil and gas leases.

Impact of the Proposed Severance Tax

The proposed severance tax on oil and natural gas would be imposed on all natural gas severed, saved and removed from Tribal lands. The *limited burden* of the proposed tax on the intrastate and interstate consumer (assuming the increased cost is passed on) may be illustrated using production and price data available for 1974 and 1975.

Data is not now available to measure precisely the impact on New Mexico consumers of petroleum and petroleum products. What evidence is available suggests that it will be very small indeed. More specifically, it cannot be argued that the price of petroleum and petroleum products to New Mexico consumers would increase proportionately. In fact, little oil is processed in the state of New Mexico for consumption in New Mexico. As a result , oil from Jicarilla leases is commingled with production from other areas, refined and distributed throughout the Western states. The burden of the proposed severance tax is thus, in a major degree, shifted to consumers outside the state of New Mexico.

The proposed severance tax will have a more direct and more easily quantifiable impact on the New Mexico consumer of natural gas. Based on 1975 data, the additional tax burden resulting from the severance tax on natural gas is estimated at $2,095,168. This tax burden (assuming it is passed on to the consumer) will be shared by consumers of natural gas (both intrastate and interstate) and consumers of liquid hydrocarbons (both intrastate and interstate). A Federal Power Commission publication *Sales by*

Producers of Natural Gas to Interstate Pipeline Companies indicates that the Btu content of *dry* natural gas transported by El Paso Natural Gas from the San Juan Basin averaged 1083 Btu per cubic foot. U.S.G.S. Roswell, New Mexico reports an average Btu content for *wet* natural gas from Jicarilla leases of 1164 Btu per cubic foot. Based on this data 93% of the tax burden (1083 ÷ 1164) will be allocated to consumers of natural gas. The remaining 7% allocated to consumers of liquid hydrocarbons. Thus, in the analysis which follows it will be assumed that $1,948,506 of the tax burden (93% × $2,095,168) will be borne by consumers of natural gas and $146,662 of the tax burden (7% × $2,095,168) will be borne by consumers of liquid hydrocarbons.

Impact on Intrastate Consumers of Natural Gas

Data supplied by U.S.G.S. Roswell, New Mexico indicate that during the years 1972 through 1975 the Southern Union Gas Company purchased approximately 35 percent of the gas produced from Jicarilla leases. A more recent review by U.S.G.S. of Southern Union purchases from Jicarilla leases suggests their purchases may be as much as 40 percent of total Jicarilla production. Using this 40 percent figure, we can conclude that New Mexico consumer's tax burden would increase by approximately $779,402. This figure is obtained by multiplying 40 percent times estimated tax burden to be borne by consumers of natural gas $1,948,506.

During the twelve months ending December 31, 1976 Southern Union Gas Company (and Southern Union Gathering Company) purchased 131,923,549 Mcf of natual gas for sale to New Mexico consumers. The estimate of Southern Union purchases of natural gas from Jicarilla leases (12,305,992 Mcf) was less than 10 percent (9.3%) of the total Southern Union purchases of natural gas for sale to New Mexico consumers.

Based on this information the increase in the average cost of natural gas to the New Mexico consumer is estimated at 6/10 of one cent (or $ .006) per Mcf. This estimate is obtained by dividing the estimated additional tax burden

on New Mexico consumers of natural gas $779,402, by total natural gas purchased by Southern Union for sale to New Mexico consumers 131,923,549 Mcf.

Data from the 1974 *Annual Report* of the New Mexico Public Service Commission is also helpful in placing this tax in perspective.

Natural Gas Utilities Customer Statistics 1973

	Residential and Rural	Commercial & Industrial	All Other	Total
Average Annual Mcf Used Per Customer	124	2.704	5.333	453
Average Gross Revenue Per Mcf Sold	$ .98	$ .43	$ .37	$ .56
Average Annual	$125.80	$1,160.93	$1,979.03	$256.00

According to these 1973 figures the proposed severance tax would increase the *average annual bill* of residential and rural customers by approximately 74 cents. New Mexico commercial and industrial customers would find their average annual bill increased by approximately $16.22.

Impact on Interstate Consumers on Natural Gas

As indicated in an earlier section of this report, Southern Union purchases approximately 40 percent of the natural gas produced from Jicarilla leases. The remaining 60 percent is purchased by two interstate pipeline companies, El Paso Natural Gas Company and Northwest Pipeline Company. Thus, it is estimated that interstate pipeline companies purchased approximately 21.6 billion cubic feet of natural gas produced from Jicarilla leases in 1975 (60 percent × 35,999,456 Mcf).

A substantial portion of the natural gas purchased in New Mexico by El Paso Natural Gas Company is delivered to Pacific Gas and Electric Company. (PG & E, a California firm) at the Arizona-California border. According to the prepared testimony of John A. Sproul, Vice President - Gas Supply of Pacific Gas and Electric Company, "In

1972, approximately 409 billion cubic feet of gas was purchased from El Paso Natural Gas and this accounted for over 40 percent of our total gas purchases". (Pacific Gas and Electric Company, Gas Department, Proposed Testimony in Support of Offset Rate Proposal, Application No. 53866, Exhibit No. 1, p. 2).

In order to obtain some indication of the impact of the proposed severance tax on interstate consumers of natural gas the following assumptions will be made: that interstate pipeline companies purchased 60 percent of the natural gas produced from Jicarilla leases, that all the natural gas purchased by interstate pipelines was delivered by El Paso to PG & E, that in 1975 El Paso sold 409 billion cubic feet of natural gas to PG & E (the same amount it sold to PG & E in 1972), that in 1975 PG & E purchases from El Paso Natural Gas were still approximately 40 percent of their total gas purchases, and that the Btu content of natural gas delivered by El Paso Natural Gas to PG & E was 1083 Btu per cubic foot.

Based on these assumptions the tax burden to be borne by PG & E customers will equal $1,169,104, which is 60 percent of the total to be borne by customers of dry natural gas, $1,948,506. The natural gas from Jicarilla leases purchased by interstate pipeline companies was approximately 5.3 percent of the total delivered to PG & E by El Paso. A tax averaging 5.4 cents per Mcf would thus increase the average cost of gas delivered to PG & E by El Paso Natural Gas by approximately 3/10 of one cent per Mcf (.053 × $ .054 = $ .0028). The effect on the average price of natural gas for PG & E customers would be an increase of approximately 1/10 of one cent per Mcf (.40 × $ .0028 = $ .0011).

The 1974-75 *Annual Report* of the California Public Utilities Commission reports that "average gas usage per firm customer" for the years 1970 through 1974 averaged 138.0 Mcf. The severance tax would thus increase the average annual bill of the California customer by approximately 15 cents.

Impact on Consumers of Liquid Hydrocarbons

It has been estimated (based on the relative Btu content of wet and dry natural gas) that consumers of liquid hydrocarbons will bear $146,662 or approximately 7 percent of the total tax burden resulting from the severance tax on natural gas.

Data on New Mexico consumption of liquid hydrocarbons is not currently available. It is therefore difficult to estimate the precise impact on the average New Mexico consumer. Some perspective of the impact is provided by the examination of production data available from the New Mexico Oil and Gas Engineering Committee.

The *Annual Report* of the New Mexico Oil and Gas Engineering Committee, Hobbs, New Mexico, Volume II, Northwest New Mexico, 1975, reports the following summary of extraction plant operations in the San Juan Basin in 1975.

Total Intake	339,836,594 Mcf.
Gasoline	3,373,701 BBLS,
Butane	4,027,708 BBLS.
Propane	4,585,225 BBLS.
	11,986,634 BBLS.

Thus, .03 bbls. of liquid hydrocarbons were produced for every Mcf of natural gas intake from the San Juan Basin. Applying this relationship to the natural gas production from Jicarilla leases provides an estimate of liquid hydrocarbon production from Jicarilla natural gas of 1,079,984 bbls. (.03 × 35,999,456 Mcf = 1,079,984 bbls).

The tax burden may therefore be estimated at 13.6 cents per barrel ($146,662 ÷ 1,079,984 bbls = $ .136) or .003 cents per gallon of liquid hydrocarbons.

Summary

The proposed severance tax on oil and natural gas produced from Jicarilla leases will provide significant additional tax revenue for the Jicarilla Apache Nation. This revenue will partially offset the effect on Tribal revenues

of artifically depressed levels of oil and natural gas wellhead prices and thus provide funds for the development of a "permanent fund" and the payment of administrative costs associated with the development of these energy resources. This can be accomplished without significantly increasing the cost of these fuels to the ultimate consumer.

Alfred L. Parker
Professor of Economics
University of New Mexico

APPENDIX C

NATURAL GAS POLICY ACT OF 1978
EXCERPT

SECTION 110
P. L. 95-621
92 STAT. 3369

SEC. 110. TREATMENT OF STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.

(a) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) LIMITATION ON STATE SEVERANCE TAXES.—The State severance tax allowable under subsection (a) (1) with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) DEFINITION OF STATE SEVERANCE TAX.—For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, or other levy imposed on the production of natural gas—

(1) by any State or Indian tribe (as defined in section 106 (b) (2) (B) (ii); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

Appendix D

Form 5-157,
Oil and Gas Mining Lease,
Tribal Indian Lands.
Tribal Lease Contract No. 119
Joint Appendix, CCA 10th, pp. 188-194.
(Excerpts)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
OIL AND GAS MINING LEASE—
TRIBAL INDIAN LANDS
JICARILLA APACHE TRIBE, STATE OF NEW MEXICO

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 24th day of April, 1953, by and between Frank Vigil, Chairman of the Jicarilla Apache Tribal Council of Dulce, State of New Mexico, for and on behalf of the Jicarilla Apache Tribe of Indians, designated herein as lessor, and Phillips Petroleum Company of Bartlesville, State of Oklahoma, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of $71,845.99, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Rio Arriba, State of New Mexico, and more particularly described as follows: (description omitted.) containing 2587.18 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone

lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(*a*) *Bond.*—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(*c*) *Rental and royalty.*—To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil and gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual

volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided,* That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further,* That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in section 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the treasurer of said tribe* or the superintendent. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the treasurer of said tribe or to the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(*d*) *Monthly statements.*—To furnish to the oil and gas

* All payments under this lease shall be made to the superintendent where the tribe affected is not organized under the act of June 18, 1934 (48 Stat. 984).

supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the treasurer of said tribe or the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

The attached Special Stipulations in one page and the Forest and Land Protection Stipulations in two pages, are hereby made a part of this lease.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned: (Signatures and approvals omitted)

Jicarilla Tribal Lands

FOREST AND LAND PROTECTION STIPULATIONS

The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lessee hereby agrees: (Stipulations omitted.)

(7) The foregoing stipulations are hereby made a part of Oil and Gas Lease executed April 24, 1953, covering TRACT No. 216.

Lessee: Phillips Petroleum Company
(Signatures omitted.)

Jicarilla Tribal Land Oil and Gas Lease

SPECIAL STIPULATIONS (omitted)

APPENDIX E

REVISED CONSTITUTION OF THE JICARILLA APACHE TRIBE

DECEMBER 15, 1968

(EXCERPT)

ARTICLE XI—POWERS OF THE TRIBAL COUNCIL

Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution.

(a) *Management of tribal lands and natural resources:*

1. *Leasing.* In the leasing of tribal lands, first preference shall be given, whenever feasible and in the best interest of the tribe, to tribal members or associations of members.

2. *Regulations.* Land use codes and regulations may be adopted by the tribal council to govern land use, including the assignment of tribal lands to tribal members for individual use.

3. *Resource Development.* Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based upon sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the tribe as a whole. The tribal council may enact ordinances to govern the development of tribal lands and other resources.

4. *Inalienability of Tribal Lands.* The tribal lands shall be inalienable.

(b) *Subordinate organizations.* The tribal council may, with the approval of the Secretary of the Interior, authorize and regulate tribal corporations, associations

and other subordinate organizations for economic and other purposes, and may transfer tribal assets thereto for management and control, provided that such subordinate organizations, including the tribal corporation chartered pursuant to the provisions of Section 17 of the Act of June 18, 1934, (48 Stat. 984), shall exercise control over tribal land, natural resources, and other property or assets of the tribe only to the extent that such control has been transferred to such subordinate organization by positive enactment of the tribal council.

(c) *Tribal funds.* The tribal council shall be responsible for management of all funds within the control of the tribe, and may appropriate available tribal money for public, business and governmental purposes, provided that such appropriations are incorporated in and expended in conformity with annual budgets subject to the approval of the Secretary of the Interior or his authorized representative and provided further that:

1. The tribal council shall provide for adequate accounting of all tribal financial transactions, including a comprehensive annual audit, and for adequate bonding of tribal officials and employees who are directly responsible for the receipt, disbursement and custody of tribal funds.

2. The council shall maintain a capital reserve fund with tribal revenues, into which there shall be deposited each year no less than fifteen percent (15%) of the total annual income for the preceding fiscal year, and shall arrange for the investment of the funds. No per capita distribution shall ever be made from the principal of such capital reserves except by the consent of 75% of the qualified voters of the tribe and with the approval of the Secretary of the Interior.

3. The tribal council may declare an annual dividend for equal distribution to each member of the tribe living and enrolled as of the date such dividend is declared; provided that funds designated

for dividend purposes shall be restricted to the annual income remaining after tribal operational costs, and the deposit into the capital reserve fund, as required by (2) above, have been deducted.

4. The tribal council shall have the power to borrow money for business and development purposes, but when such loans are negotiated with non-Federal sources of credit, the terms of the loan agreement shall be subject to approval by the Secretary of the Interior.

(d) *Peace and order.* Subject to approval by the Secretary of the Interior, the tribal council may enact ordinances to promote the peace, safety, property, health and general welfare of the people of the reservation; to provide for the appointment of guardians for minors and mental incompetents; and to provide for the removal or exclusion from the reservation of any non-member whose presence may be found by the tribal council to be injurious to members of the tribe. In addition, the tribal council shall provide for the enforcement of tribal ordinances on the reservation, and shall prescribe the powers, rules and procedures of the tribal courts in the adjudication of cases involving criminal offenses, domestic relations, civil actions, and the inheritance and probate of non-trust real and personal property of members of the tribe and non-member Indians within the reservation.

(e) *Taxes and fees.* The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

(f) *Conduct of tribal affairs.* The tribal council may enact ordinances for the regulation of its own procedures, including: power of subpoena; the power to administer oaths and affirmation; the power to adopt and amend bylaws; and the council may appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitu-

tion, and may prescribe their salaries, tenure and duties.

Sec. 2. Any resolution, ordinance or other enactment which, by the terms of this constitution or in conformity with applicable Federal law, is subject to approval by the Secretary of the Interior, shall be presented to the Superintendent of the Jicarilla Apache Reservation within ten (10) days following its approval by the President of the Jicarilla Apache Tribe, or in the event of presidential veto — within ten (10) days following the date of its repassage over such veto by a three-fourths majority of the tribal council as provided by Article XVI, Section 1(e). The superintendent shall, within ten (10) days following receipt of such ordinance or resolution, transmit it to the Secretary of the Interior with his recommendation for or against approval. Such enactment shall become effective when approved by the Secretary of the Interior, provided that if the Secretary of the Interior shall not disapprove an enactment of the tribal council within one hundred twenty (120) days following its submittal to him for approval action, it shall thereupon become effective.

No. 80-11

In The

Supreme Court of the United States

October Term 1980

J. Gregory Merrion and Robert L. Bayless,
d/b/a Merrion and Bayless, *et al.*,

Petitioners,

v.

Jicarilla Apache Tribe, Jicarilla Apache
Tribal Council, and Cecil Andrus,
Secretary of the Interior, *et al.*,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals For The
Tenth Circuit

SPECIAL APPENDIX LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS PURSUANT TO AMENDED RULE 28.1, RULES OF THE SUPREME COURT OF THE UNITED STATES

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Respondents.

SPECIAL APPENDIX CORPORATE SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Pursuant to the provisions of Rule 28.1, Rules of the Supreme Court of the United States, Corporate petitioners herein submit listings of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates, which is complete and correct to the best of their information and belief:

J. Gregory Merrion and *Robert L. Bayless* are natural persons doing business under the partnership of *Merrion and Bayless*. These Petitioners have no corporate subsidiaries or affiliates.

Jerome T. McHugh is a natural person. This Petitioner has no corporate subsidiaries or affiliates.

Chace Oil Company: Chace Oil Company is a wholly owned subsidiary of Cobb Nuclear Corporation, a New Mexico Corporation. It has no subsidiaries or affiliates.

Dugan Production Corporation has no parent company, subsidiaries or affiliates.

Consolidated Oil & Gas Inc. has the following subsidiaries:
King Coal Company, Inc., Alabama Corporation.
Sandrock Oil Co., Inc., Delaware Corporation.
R. L. Burns, Inc., Delaware Corporation.
(*Princeville Realty Corporation*, a wholly owned subsidiary has as its subsidiaries, Princeville Restaurant Corporation, Princeville Management Corporation, Princeville Cottage Corporation, and Princeville Water Systems, Inc.)

Southland Royalty Company has two independently administered royalty trusts which are not believed to be affiliates, but are listed to assure compliance with Rule 28.1:
Permain Basin Royalty Trust
San Juan Basin Royalty Trust

Tesoro Petroleum Corporation has two subsidiaries:
Trinidad-Tesoro, owned 49.9% by Tesoro, which owns Trinidad-Tesoro Agricultural Company Limited (formerly Palo Seco Estates Limited):
Corco, owned 36.7% by Tesoro.

Amerada Hess Corporation is partial owner of or affiliated with the following companies:
Wyatt Inc.
Solar Gas Inc.
Oasis Oil Company of Libya, Inc.
Bushehr Petroleum Co.
Matco Tankers (U.K.) Ltd.
Anglomar Shipping Company Ltd.
First United Shipping Corp.
Second United Shipping Corp.
Third United Shipping Corp. (Formerly Lion Tankers, Ltd.)
Interocean Tanker Corp.
Granreunion Co.
Atlas Morene Co.
Artemis Marine Co. L.P.
Ariadne Co. L.P.
St. Croix Petrochemical Corp.
Conmar Terminals, Ltd.
D'Ippolito Oil Company

Meadville Corporation
Ontario Terminals, Inc.
Reserve Terminal Corporation
Second Reserve Terminal Corp.
South Jersey Terminal Corp.

Supron Energy Corporation affiliate:
Total Petroleum Inc., owns 9.5% of Supron's outstanding shares.

Energy Reserves Group, Inc., has the following subsidiaries or affiliates:

Clinton International Corporation
Clinton International (England) Ltd.
Clinton International (North Sea) Ltd.
Clinton International Ltd.

J. M. Huber Corporation has no parent companies, subsidiaries or affiliates.

Continental Oil Company, (now *Conoco Inc.*) has the following subsidiaries (other than wholly-owned subsidiaries) or affiliates:

Big Sky of Montana Realty, Inc.
Calcasieu Chemicals Corporation
Condea Chemie, GmbH
CitCon Oil Corporation
Conch International Methane, Ltd.
Conoco, A.G.
Petroquimica Espanola, S.A. (Petresa)*
T.A.L. (Austria)*
T.A.L. (Italy)*
T.A.L. (Luxembourg)*
Conoco Limited
Conoco Management Company
Conoco Exploration, Ltd.*
Conoco Mineraloel GmbH
T.A.L.*

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* Indicates partially owned company of wholly owned subsidiary.

Conoco North Sea, Inc.
K/s Statfjord Transport A. S. & Co.*
Statfjord Transport A.S.*
Conoco Norway Inc.
K/s Statfjord Transport A.S. & Co.*
Statfjord Transport A.S.*
Consolidation Coal Company — 100%
Bishop Coal Company*
Cardinal River Coals, Ltd.*
Contochu, Inc.*
Harmar Coal Company*
Itmann Coal Company*
Mathies Coal Company*
Consolidation Coal Sales Company*
Wolfpen Knob Development Company*
Stone Cove Coal Company
Continental Carbon Company
Carbon Black Espanola, S.A.
Columbian Continental Europa, S.p.A.
Compagnie Francaise du Carbon Black, S.A.
Continental Carbon Australia Pty. Limited
Continental Columbian Carbon Nederland, B.V.
Continex Francaise S.A.R.L.
Continex Nederland B.V.
Continex S.r.l.
Lucky Continental Carbon Co., Ltd.
Toyo Continental Carbon, Ltd.
Conoco (U.K.) Limited
Associated Petroleum Terminals (Immingham) Ltd.*
Cliffe Storage, Ltd.*
Crude Oil Terminals, Ltd.
Humber Oil Terminals Trustee, Ltd.*
Petroleum Storage, Ltd.*
Warwickshire Oil Storage, Ltd.*
Continental Pipe Line Company
Colonial Pipeline*
Dixie Pipeline*
Lake Charles Pipe Line*

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* Indicates partially owned company of wholly owned subsidiary.

Pioneer Pipe Line Company*
Platte Pipe Line*
Seadock, Inc.*
Seaway Pipeline, Inc.*
West Shore Pipe Line*
Yellowstone Pipe Line*
Explorer Pipeline Company
Felix Oil Company
Hudson's Bay Oil and Gas Company Limited
Alberta Gas Truck Line Company, Ltd.
Aurora Pipe Line Company
Cansulex Ltd.
Chieftain Mac Gas Ltd.
Hudbay Exploration, Inc.

Hudbay Mining Limited
Hudbay Oil Company of Denmark A/S
Hudbay Oil Company of Denmark Ltd.
Hudbay Oil (Australia) Ltd.
Hudbay Oil (Egypt) Ltd.
Hudbay Oil (Indonesia) Ltd.
Hudbay Oil International Ltd.
Hudbay Oil (Ireland) Ltd.
Hudbay Oil (Malacca Strait) Ltd.
Hudbay Oil (Netherlands) Ltd.
Hudbay Oil (Spain) Ltd.
Hudbay Oil (Turkey) Ltd.
Hudbay Uranium Ltd.
Hudson's Bay Oil and Gas Company (U.K.) Limited
Norske Hudbay A/S
Northward Developments, Ltd.
Peace Pipe Line, Ltd.
Rangeland Pipe Line Company Limited
Rimbey Pipeline Co., Ltd.
Smiley Gas Conservation Ltd.
Sultran Ltd.
Syncrude Canada, Ltd.
Kettleman North Dome Association

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* Indicates partially owned company of wholly owned subsidiary.

Long Beach Oil Development Company
Maritime Protection A/S
Nippon Aluminum Alkyes, Ltd.
NissanConoco Corporation
Oil Shippers Service, Inc.
OMW (Karlsruhe)
Pasa Petroquinica Argentina, S.A.
Petroleum Terminals, Inc.
Petrocokes, Ltd.
San Jacinto Eastern Corporation
Iricon Agency, Ltd.*
Selang Ltd.
Southern Facilities, Inc.
Standard Shale Products Company

Atlantic Richfield Company, in addition to its wholly owned subsidiaries, owns varying degrees of stock in the following companies:

Alyeska Pipeline Service Company
Badger Pipe Line Company
Black Lake Pipe Line Company
Chapin, Kieley & Howe, Inc.
Colonial Pipe Line Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipe Line Company
East Texas Salt Water Disposal Company
Flower Street Limited
Gravity Adjustment, Inc.
Griffith Consumers Company
Hardy Oil Company
Hydrokem Performance Chemical Company
Iricon Agency Ltd.
Kenai Pipe Line Company
Lavan Petroleum Company
Montoro, Empresa Para La Industria Quimica
Nihon Atlantic Company Ltd.
Nihon Oxirane Company Ltd.

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* Indicates partially owned company of wholly owned subsidiary.

Northrup Energy Corporation
Oil Shippers Service, Inc.
Ontario Terminals, Inc.
Platte Pipe Line Company
Sinclair Venezuelan Oil Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company
Wright Oil Company, Inc.

Phillips Petroleum Company has the following subsidiaries (other than wholly owned subsidiaries) and affiliates:

Acurex Corporation
Aero Oil Company
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Artic LNG Transportation Company
Bonny LNG Ltd. (P.P. Worldwide Gas Ltd.)
Bruin Carbon Dioxide Sales Corporation
Calatrava Empresa Para la Industria Petroquimica, S.A.
Canada Western Cordage Co., Ltd.
Canyon Reef Carriers Inc.
Cochin Refineries Ltd.
Colonial Pipeline Company
Compagnie Francaise du Carbon Black S.A.
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Gardner Cryogenics Europe N.V.
Insurance and Reinsurance Brokers (Bermuda) Ltd.
Iranian Marine International Oil Company
Kaw Pipe Line Company
Kenai LNG Corporation
LeeFac, Inc.
Negromex S.A.
Nordisk Philblack AB
Norland Gmbh
Norpipe A/S
Norpipe Petroleum U.K. Ltd.
Norsea Gas A/S
Norsea Gas GmbH

Norsea Pipeline Ltd.
Papago Chemicals, Inc.
Petrochim
Phillips Carbon Black Company (Pty.) Ltd.
Phillips Carbon Black Italiana S.p.A.
Phillips Carbon Black Limited
Phillips Gas Supply Corporation
Phillips Imperial Petroleum Limited
Phillips Pacific Chemical Company
Phillips Petroleum Singapore Chemicals (Private) Limited
Philmac Oils Limited
Plasticos Vanguardia S.A.
Polar LNG Shipping Corporation
Polyolefins
Powder River Corporation
Renolit Fertighaus GmbH
Seadock Inc.
Seaway Pipeline, Inc.
Sevalco (Holdings) Limited
Societe De Development Des Polyolefins
Transatlantic Reinsurance
Trenwick Ltd.
Western Desert Operating Petroleum Company
White River Shale Oil Corporation

Tenneco Oil Company is a wholly owned subsidiary of Tenneco Corporation, a 99% owned subsidiary of Tenneco Inc. Tenneco has only wholly owned subsidiaries. Subsidiaries of Tenneco Inc., and Tenneco Corporation, or of their subsidiaries, other than wholly owned subsidiaries, and affiliates as of December 31, 1979, are:

Border Gas, Inc.
Monroe Auto Pecas S.A. (Brazil)
Onner do Brasil S.A. (Brasil)
Collins Pipeline Company
Kern River Canal and Irrigating Company
MISTAL Inc.
Nuodex of Canada, Ltd. (Canada)
Tenngasco Gas Gathering Company
HT Gathering Company
T & M Terminal Company

Tenneco Oil Company of Nigeria (Nigeria)
Compania Fenanciera Cose, S.A. (Spain)
Construcciones Agrometalicas Levante, S.A. (Spain)
D.A.R. France, S.A. (France)
Establissement Robert Bellanger, S.A. (France)
Losenhausen Machenenban AG (Germany)
Poclain do Brasil S.A. (Brazil)
Poclain Hispana S.A. (Spain)
Societe Anonyme Industruille de Resines (France)
S.A. Paper Chemical Prxprietary, Ltd. (South Africa)
Tees Storage Limited England
Albright & Wilson (Australia) Ltd. (Australia)
Bush Boake Allen (India), Ltd. (India)
GMB Proteins Ltd. (England)
W. J. Bush and Company (Nigeria), Ltd. (Nigeria)
Turoce Nihausawa, Ltd. (Nigeria)
Arndale Fuels, Ltd. (United Kingdom)
Bracey Petroleum Products, Ltd. (United Kingdom)
Tenneco Oil Products, Ltd. (United Kingdom)
Intertrac Cichmann & Co. (Germany)
Stoco Mutual Water and Sewer Company
Tractortechnic Canada, Ltd. (Canada)

Tenneco Offshore Company, Inc. (receives management and administrative services provided by Tenneco Oil Company and its directors were nominated by Tenneco Oil Company)

Tenneco Exploration, Ltd., and Tenneco Exploration II, Ltd., are limited partnerships and Tenneco Oil Company is the General Partner.

Getty Oil Company has the following partially owned subsidiaries and/or affiliates:

Chemplex Company
Chemplex Construction Corporation
Crescent Petroleum Company
Texoma Pipe Line Company
Mitsubishi Oil Company, Limited
Iricon Agency Ltd.
Osage Pipe Line Company
Texas-New Mexico Pipe Line Company
Tide Water Oil Company (India) Limited

Vancouver Plywood Co., Inc.
Yong-Nam Chemical Company, Ltd.
Entertainment and Sports Programming Network, Inc.
Blue State Petroleum (Malta) Ltd.
Butte Pipe Line Company
Canadian Reserve Oil and Gas Ltd.
Gibson Holdings, Ltd.
Gibson Petroleum Ltd.
Halbouty Alaska Oil Company
Northern Tier Pipeline Company
Wascana Pipe Line, Inc.
Wascana Pipe Line, Ltd.

Gulf Oil Corporation has the following subsidiaries and affiliates:

Afran Bahamas Limited
Afran Transport Company
J-Jin Chemical Company, Ltd.
American Heavy Lift Shipping Company
Andogas S.A.
Argentine Gulf Oil Company
Australian Gulf Oil Company
Bahamas Gulf Oil Company
Belgulf Tankers N.V.
Bio Research Center Company, Limited
Blackships, Inc.
Bolivian Gulf Oil Company
Brazilian Gulf Oil Company
Britama Tankers Limited
Bulk Petroleum Corporation
Burgan Pension Fund Trustees Limited
Cabinda Gulf Oil Company
Caribbean Gulf Refining Corporation
China Gulf Oil Company Limited
China Gulf Plastics Corporation
Chinhae Chemical Company, Ltd.
Colombian Gulf Oil Company
Colonial Pipeline Company
Compania Ecuatoriana Texaco y Gulf, S.A.
Compania Maritima Rio Gulf S.A.

Compania Petrolera Aguarico, S.A.
Coral Gulf Oil Company
County Airport Corporation
Dansk Olia-Import A/S
Det Gronlandske Olicaktieselskab
Dixie Pipeline Company
Eastern Gulf Oil Company Limited
Eastern Venezuela Gas Transport Company
Ecuadorian Gulf Oil Company
Explorer Pipeline Company
Four Corners Pipeline Company
The "400" Oil Co., (A Division of Bulk Petroleum Corporation)
Frisia Minerallolien B.V.
The Gaelic Oil Company Limited
Global Energy Operations and Management Company-International (A Division of Transocean Gulf Oil Company)
Global Energy Operations and Management Company, Ltd.
Global Energy Operations and Management Company-U.S. (A Division of Gulf Oil Corporation)
Grand Bay Co.
Gulf Agricultural Chemicals Company Limited
Gulf Asian Investments Company Limited
Gulf Asian Services (A Division of Gulf Asian Investments Company Limited)
Gulf Benzin A/S
Gulf Chemicals International, Inc.
Gulf Computer Sciences Incorporated
Gulf Consumer Services Company (A Division of Gulf Oil Corporation)
Gulf del Peru, S.A.
Gulf Ecuatoriana de Petroleo, S.A.
Gulf Energy and Minerals Company (A Division of Gulf Oil Corporation)
Gulf Energy and Minerals Company-International (A Division of Gulf Oil Corporation)
Gulf Energy and Minerals Company-U.S. (A Division of Gulf Oil Corporation)
Gulf Europe Company

Gulf-Gas (Norway) A/S
Gulf-Gas (Sweden) Aktiebolag
Gulf International Company
Gulf International Trading Company (A Division of Gulf Oil Corporation)
Gulf International Trading Company (A Division of Gulf Oil Trading Company, Limited).
Gulf International Trading-Far East (A Division of Gulf Asian Investments Company Limited)
Gulf Italia Production Company S.p.A.
Gulf Italiana S.p.A.
Gulf Kuwait Company
Gulf Management Institute (A Division of Gulf Oil Corporation)
Gulf Marine and Services Company Limited
Gulf Marine Management Company (A Division of Afran Transport Company)
Gulf Merchandising Company (A Division of Bulk Petroleum Corporation)
Gulf Mineral Resources Co. (A Division of Gulf Oil Corporation)
Gulf Minerals Canada Limited
Gulf Oil (Antilles) Inc.
Gulf Oil (Belgium) S.A.
Gulf Oil Canada Limited
Gulf Oil Chemicals Company (A Division of Gulf Oil Corporation)
Gulf Oil Chemicals Company Asia, Limited
Gulf Oil Communications Company, Inc.
Gulf Oil Company-Asia
Gulf Oil Company-Eastern Hemisphere
Gulf Oil Company (Hong Kong) Inc.
Gulf Oil Company-International (A Division of Gulf Oil Corporation)
Gulf Oil Company-Japan (A Division of Gulf Oil Corporation)
Gulf Oil Company-Korea (A Division of Gulf Oil Corporation)
Gulf Oil Company-Latin America (A Division of Gulf Oil Corporation)
Gulf Oil Company (Nigeria) Limited

Gulf Oil Company of Gabon
Gulf Oil Company (Portugal) Limitada
Gulf Oil Company-South Asia
Gulf Oil Company-Thailand (A Division of Gulf Oil Corporation)
Gulf Oil Company-U.S. (A Division of Gulf Oil Corporation)
Gulf Oil European Company
Gulf Oil Financial Corporation
Gulf Oil Foundation of Delaware
Gulf Oil Germany, Inc.
Gulf Oil (Great Britain) Limited
Gulf Oil (Luxembourg) S.A.
Gulf Oil Marine Agency N.V.
Gulf Oil Middle East Trading Company (A Division of Gulf Oil Trading Company, Limited)
Gulf Oil (Nederland) B.V.
Gulf Oil Northern Development Company (A Division of Gulf Minerals Canada Limited)
Gulf Oil Production Company
Gulf Oil Raffinaderij B.V.
Gulf Oil Real Estate Development Company
Gulf Oil Refining A/S
Gulf Oil Refining Limited
Gulf Oil Sales, Inc.
Gulf Oil Securities Company, Inc.
Gulf Oil Services, Inc.
Gulf Oil (Switzerland)
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Trading Company (A Division of Transocean Gulf Oil Company)
Gulf Oil Trading (Far East) (A Division of Gulf Asian Investments Company Limited)
Gulf Oil Trading Investments Limited
Gulf Oil Zaire S.A.R.L.
Gulf Overseas trading, Inc.
Gulf Petroleum S.A.
Gulf Refining and Marketing Company (A Division of Gulf Oil Corporation)
Gulf Refining Company
Gulf Research & Development Company

Gulf Research Racing Company
Gulf Reston, Inc.
Gulf Reston Properties, Inc.
Gulf Science and Technology Company (A Division of Gulf Oil Corporation)
Gulf Supply and Distribution Company Limited
Gulf Technology Europe B.V.
Gulf Tire & Supply Company
Gulf Trading and Transportation (A Division of Transocean Gulf Oil Company)
Gulf Trading and Transportation Company (A Division of Gulf Oil Corporation)
Gulf Transport Company Aktiebolag
Gulf Travel Club, Inc.
Gulf (U.K.) Offshore Investments Limited
Hagstrom & Knape Oljeaktiebolag
Hutchison-Hayes International, Inc.
Hydrant Servicing Company Limited
Iberian Gulf Oil Company
Indonesia Gulf Oil Company (A Division of Gulf Oil Corporation)
Industrial Asphalt (A Division of Gulf Oil Corporation)
Insco Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Java Gulf Limited
Keydril Company
Keydril Limited
Keydril U.S.A. (A Division of Gulf Oil Corporation)
Key International Drilling Company Limited
Korea Gulf Oil Company
Korea Lubricants Company, Ltd.
Korea Oil Corporation
Kupan Emirates Company Limited
Kupan Financial Company (Rotterdam) B.V.
Kupan International Company
Kuwait Oil Company Limited
Kuwait Oil Company Trustees Limited
Laurel Pipe Line Company
Lost Hills Water Company
Mainline Pipelines Limited

Mene Grande Oil Company
Michigan Stations (A Division of Bulk Petroleum Corporation)
Michigan Stations-Personnel Services (A Division of Bulk Petroleum Corporation)
Midcaribbean Investments Limited
Mozambique Gulf Oil Company
National Butane Company
Nedgulf Tankers B.V.
A/S Nordisk Flaskegas
A/S Nordisk Flaskegas Holding Co.
Nordisk Gulf-Gas A/S
Norsk Gulf A/S
Northeast Stations & Services, Inc.
Norwegian Gulf Oil Production Company
Okan Pipeline Company
Okinawa Sekiyu Seisei Company, Ltd.
B. V. Olie Handelsvereeniging (Oil Trading Association)
Pacific Gulf Oil Limited
Pennsylvania Oljeimport Aktiebolag
Petroleo Gulf do Brasil Limitada
Petroleos Gulf de Guatemala, S.A.
Petroleos Gulf del Ecuador C.A.
Petroleum Products Storage and Transport Company S.A.
Petrosil Oil Company Limited
The Pittsburg & Midway Coal Mining Company
Productos Latinoamericanos, S.A.
Propet Company, Limited
Refineria de Petroleos del Norte S.A. (Petronor)
SARNI, S.p.A.
Shawinigan Products Corporation
Sociedad Anonima Espanola de Lubrificantes (SAFL)
SOLVO Finance and Investment Corporation Ltd.
South Pacific Gulf Oil Company
Spanish Gulf Oil Company
Spencer Quimica Mexicana, S.A. de C.V.
Sunrise International Company, Limited
Svenska Aktiebolaget Alfred Olsen & Co.
Svenska Gulf Oil AB
Taiwan VCM Industries Corporation
Transocean Chemicals Company

Transocean Chemicals Company (Hong Kong) Limited
Transocean Gulf Oil Company
Transport Oil Company-Madison (A Division of Bulk Petroleum Corporation)
Transport Oil Company-Milwaukee (A Division of Bulk Petroleum Corporation)
United Petroleum Securities Corporation
Venezuela Gulf Refining Company
Venture Acceptance Corporation
Venture Out in America, Inc.
Veritas Oil Company Aktiebolag
Warren Petroleum Company (A Division of Gulf Oil Corporation)
West Texas Gulf Pipeline Company
Zaire Gulf Oil Company

Mobil Oil Corporation has the following subsidiaries (other than wholly-owned subsidiaries) and affiliates:

Mei Foo Investments Limited
Desarrollos y Negocios,
Sociedad de Capital Variable
    Mobil Atlas Sociedad Anonima de Capital Variable
Easternoil Corporation
    Sonarep (South Africa) (Proprietary) Limited
Mobil Development Nigeria Inc.
    Mobil Producing Nigeria
Mobil Exploration Mediterranean Inc.
    ATAS — Anadolu Tasfiyehanesi Anonim Sirketi
    ATAS — Anadolu Tasfiyehanesi Anonim Sirketi
Mobil Exploration Nigeria Inc.
    Mobil Producing Nigeria
Mobil International Petroleum Corporation
    ATAS — Anadolu Tasfiyehanesi Anonim Sirketi
    Bayerische Mineral-Industrie A.G.
    Colombianos Distribuidores de Combustibles, S.A.
    General Petroleum Company, Inc.
    Compagnie Immobiliere (Comimmo)
    Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
    Mobil Oil A/S
    Mobil Oil de Chile Limitada

Mobil Oil Del Peru (C.C.) S.A.
Mobil Oil do Brasil (Industria e Comercio) Ltda.
Mobil Oil Egypt (S.A.)
Mobil Oil Guinee S.A.R.L.
Mobil Oil Hellas A.E. Petroleum Company
Mobil Oil oy ab
Mobil Oil Tecnica de Chile, Ltda.
Zaire Mobil Oil
Mobil Chemical International Ltd.
Mobil Ami, S.A.
Constructora Calle 70, S.A.
Mobil Plastics S.p.A.
Mobil Quimica Ltda.
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil Development Norway A/S
Mobile Exploration Barbados Inc.
Mobil Exploration Barbados Limited
Mobil Exploration Barbados Limited
Mobil Exploration Equatorial Africa Inc.
Mobilrex
Mobil International Finance Corporation
Mobil Oil Caribe, Inc.
Colombianos Distribuidores de Combustibles, S.A.
Imperial Gas Co. of P.R., Inc.
Station Managers of Puerto Rico, Inc.
Mobil Intra-West Trading Company
Mobil LNG Indonesia Inc.
Mobil Oil Aktiengesellschaft in Deutschland
Bayerische Mineral-Industrie A.G.
Deutsche Mobil Oil Erschliessungs — Ges.m.b.H.
Deutsche Mobil Oil Explorations — Ges.m.b.H.
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Mobil Oil Gewinnings — Ges.m.b.H.
Deutsche Mobil Oil Exploration Ireland Ltd.
Mobil Beteiligungs und Vertriebsgesellschaft mbH
Henschker Mineraloelvertriebs G.m.b.H.
Mobil Oil Raffinerie G.m.b.H.
Mobil Oil Raffinerie Worth G.m.b.H. & Co. oHG
Mobil Oil Raffinerie Wilhelmshaven G.m.b.H. & Co. oHG
Mobil Oil Raffinerie Worth G.m.b.H. & Co. oHG

Mobil Oil Reederei G.m.b.H.
Offene
Handelsgesellschaft Mobil Oil A.G. in Deutschland & Co.
Offene
Handelsgesellschaft Mobil Oil A.G. in Deutschland & Co.
Mobil Oil Cameroun
Societe Camerounaise
Equatoriale De Fabrication De Lubrifiants
Mobil Oil Cote d'Ivoire
Mobil Oil de Chile Limitada
Mobil Oil del Peru (Compania Comercial)
Mobil Oil Del Peru (C.C.) S.A.
Mobil Oil do Brasil (Industria e Comercio) Ltda.
Mobil-Comercio, Industria E Servicos Ltda
Mobil Quimica Ltda.
Mobil Oil Egypt (S.A.)
Mobil Oil Francaise
Compagnie Regionale de Distribution de Produits Petroliers—Co. Re. Dis
CORCOP
CRCP
etablissements Pierre Boiron
Fuel Colmerauer S.A.
Les Nouveaux Comptoirs Petroliers
Mobil Sahara
R. Simonnet & Cie
S.A. Mas & Cie
S.A.R.L. Comptoir Rhodanien des Combustibles
S.A.R.L. Garage Pineau
Societe Civile Immobiliere du 10 Bd de la Republique a La Garenne—Colombes
Societe de Materiaux d'Etancheite pour les Entreprises
Societe Lemetayer
Societe Nouvelle Raffinerie Meridionale De Ceresines
Societe Regionale De Produits Petroliers
SOMODIP
Station-Service Lunes
Compagnie Regionale de Distribution de Produits Petroliers—Co. Re. Dis.

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Toulouse-Distribution Produits Petroliers
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Mali
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nord-Africaine
Mobil Tunisie
Mobil Oil oy ab
M.O. Kiinteistot Oy
Mobil Oil Portuguesa, S.A.R.L.
Sociedade Portugal Marrocos S.A.R.L.
Mobil Oil Raffinerie G.m.b.H.
Mobil Oil Senegal
Mobil Oil Tecnica de Chile, Ltda.
Mobil Oil Tunisia Inc.
Mobil Tunisie
Compagnie Immobiliere (Comimmo)
Emoleum (N.Z.) Limited
Neuchatel Industries (N.Z.), Ltd.
Les Peintures Mobil du Quebec Limitee
Mobil Data Services Limited
Mobil Europe Inc.
Mobil Holdings Limited
Bowen Petroleum Company (1969) Ltd.
Mobil Oil Company Limited
Mobil Services Company Limited
Mobil Oil Company Limited
Mobil Tankships Limited
Mobil Investments A.G.
Mobil LP Gaz Cyprus Limited
Societe Francaise Stoner-Mudge
Mobil Investments S.A.
Colombianos Distribuidores de Combustibles, S.A.
Mobil LP Gaz Cyprus Limited

Mobil Oil A/S
Faavang Autoverksted A/S
Mobil Development Norway A/S
Mobil Oil Australia Limited
Mobil (Southgate) Limited
Petroleum Refineries (Australia) Proprietary Limited
Mobil Oil Djibouti, S.A.
Mobil Oil Gibraltar Limited
Mobil Oil Hellas A.E. Petroleum Company
Mobil Oil Holdings S.A.
Mobil Services (Bermuda) Ltd.
General Worldwide Insurance Company
Mobil Oil Italiana Societa per Azioni
Mobil Oil New Zealand Limited
Emoleum (N.Z.) Limited
Emoleum (Asphalts) Limited
Emoleum (Contracts) Limited
Emoleum (Asphalts) Limited
Mobil Oil (Switzerland)
Benoil S.A.
Cercera S.A.
Cercera S.A.
Mobil Oil Turk Anonim Sirketi
Ankara Gas Satis Anonim Sirketi
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Mobil Gaz—Mobil Petrol Gazlari Anonim Sirketi
Mobil Petroleum Indonesia Inc.
Mobil Plastic S.p.A.
Zaire Mobil Oil
Mobil Quimica Ltda.
Mobil Tankers Company S.A.
Arabian International Maritime Company Limited
Mobil Tankships Limited
Mobil Technical Assistance Corporation
Overseas Investments Corporation
Compagnie Immobiliere (Comimmo)
Zaire Mobil Oil
Sociedade Portugal Marrocos S.A.R.L.
Mobil Oil Aktiengesellschaft in Deutschland
Mobil Oil Angola, S.A.R.L.
Mobil Oil A/S

Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Oil Del Peru (C.C.) S.A.
Mobil Oil Guinee S.A.R.L.
Mobil Oil Italiana Societa per Azioni
Mobil Oil Nigeria Limited
Mobil Tyco Solar Energy Corporation
150 East 42nd Street Corporation

NOTE:

Mobil's investments in Arabian American Oil Company (15% stock interest), a Delaware corporation, and certain other companies owned 50% or less are accounted for on the equity method. The names of these other companies have been omitted from the above list as they would not, if considered in the aggregate as a single subsidiary, constitute a significant subsidiary.

Oxy Petroleum, Inc. is a subsidiary. Each of the corporations listed below is the parent of the subsequently listed corporation:

A. Occidental Petroleum Corporation, parent of;
B. Occidental Petroleum Investment Company, parent of;
C. Occidental Oil and Gas Corporation, parent of;
D. Occidental Oil and Gas (USA), Inc., parent of;
E. Oxy Petroleum, Inc.

Oxy Petroleum, Inc., has no subsidiaries.

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Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior,

Respondents.

AMOCO PRODUCTION COMPANY, and MARATHON OIL COMPANY,

Petitioners.

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,

Respondents.

On Petition(s) For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

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BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES, AND TRIBAL CONSTITUTIONAL PROVISIONS INVOLVED

Respondents submit that there are no substantial questions involving the Interstate and Indian Commerce Clause, Article I, §8, Clause 3 of the Unitied States Constitution, and that the Leasing Act of March 3, 1927, 25 U.S.C. §§398a-e, is not applicable to the leases at issue as stated by Petitioners Amoco Production Company and Marathon Oil Company. Respondents further submit that the Treaty of Guadalupe Hidalgo is irrelevant to the issues of this case. Additional provisions of Article XI of the revised Constitution of the Jicarilla Apache Tribe are relevant and the entire Article is reproduced in Respondent's Appendix E.

STATEMENT OF THE CASE

Respondent Jicarilla Apache Tribe concurs in the Statements of the Case in both Petitions, except as to the relevancy of the Treaty of Guadalupe Hidalgo to the issues of the case, the application of the Act of March 3, 1927, 25 USC §§398a-e, and the finding of the Court that 80% of the oil and gas extracted from the reservation is shipped or sold outside the State of New Mexico.

INTRODUCTION TO RESPONSE

The Tribe will respond to both Petitions in this Brief. The Petition of Merrion and Bayless, et al., No. 80-11, will be referred to by Respondent as the "M&B Petition". The Petition of Amoco Production Company, et al., No. 80-15, will be referred to as the "Amoco Petition". The Tribe will refer to the Appendix filed by Petitioners in No. 80-11

as the "M&B Appendix", and the Appendix filed by Petitioners in No. 80-15, as the "Amoco Appendix". The Appendix of this Respondent will be designated as "Respondent's Appendix".

I

THIS CASE DOES NOT PRESENT QUESTIONS OF FEDERAL INDIAN LAW WHICH HAVE NOT BEEN RESOLVED

This case presents neither legal issues of first impression nor questions of "far ranging social, political, and economic consequences for both Indian and non-Indian" as stated by Petitioners. The power to tax non-Indians is vital to the very existence of Indian governments. But the effect on non-Indians of taxation by tribes of non-Indian enterprises and activities is magnified by Petitioners far beyond its national importance. Indian power to tax non-Indian enterprises on Indian reservations, unless withdrawn by Congress, has never been successfully disputed. Petitioners' arguments questioning this particular tax are based on erroneous interpretations of the Indian Mineral Leasing Acts and distortions of the language of the Jicarilla Apache severance tax ordinance. Moreover, the possible social, political and economic consequences fancied by Petitioners are grossly exaggerated as explained below in this Response.

The question of power of Indian tribes to tax non-Indian lessees extracting oil and gas from Indian reservation lands is one which has been resolved by this Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (U.S., decided June 10, 1980) [hereinafter cited as *Colville*]. The attempts in both Petitions to distinquish *Colville* from this case must fail in light of the repeated decisions of the courts and the opinions of Attorneys General of the United States acknowledging

tribal power to tax non-Indian activities taking place on property situated on Indian trust lands, particularly where the Tribe has a significant interest in the subject matter. This was one of the tribal powers under "existing law" confirmed by Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. *Colville, supra,* slip op. at 16. The Tribal Council of the Jicarilla Apache Tribe was granted power by its IRA Constitution to "enact ordinances, subject to approval by the Secretary of Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation." Amoco Appendix M. The Jicarilla Apache Tribe obviously has a more significant interest in the subject matter of production of non-renewable resources such as oil and gas, than do the Colville tribes in cigarette sales. See *White Mountain Apache Tribe v. Bracker*, No. 78-1177 (U.S., decided June 27, 1980).

The claim of the Amoco Petitioners that the case presents a fundamental conflict between tribal power to tax and the Congressional grant to the states of power to tax production of oil and gas from Indian reservation lands, is based upon the false assumption that the leases in suit were issued pursuant to the General Leasing Act of March 3, 1927, 25 U.S.C. §§398a-e, which authorizes state taxation of such production. The District Court was permitted by Petitioners to proceed under the misapprehension that the leases in suit were issued under the 1927 Act, although in fact, these leases were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-g. It appears that all oil and gas leases by tribes organized under the Indian Reorganization Act which have been issued since the effective date of the Act of May 8, 1938, have been issued under the terms of the later Act, which does not grant power to the states to levy taxes on production on Indian reservations

and whose terms are inconsistent with the 1927 Act.[1] There is thus no "fundamental conflict" as stated in the Amoco Petition. The jurisdiction of the State of New Mexico to impose severance taxes on production on the Jicarilla Apache Reservation is not at issue in this suit and must be determined separately on the basis of a balancing of interests of the Tribe, the Federal Government and the State as set forth in *Colville, supra*, slip op. at 19-22.

Petitioners engage in extensive operations, including geophysical and seismic exploration, drilling of wells, laying of pipelines and cutting of roadways which disturb the surface of the reservation lands and have a significant impact upon the environment, economy, culture and daily lives of tribal members. The State of New Mexico neither regulates this activity nor provides the additional services required to mitigate the impact of these operations. The United States Geological Survey divides the responsibility with the Bureau of Indian Affairs in performing environmental assessments, supervising drilling, production operations and other activities.[2] Because of failure of the Department of Interior to enforce lease provisions, including diligent development of leases, and prompt and correct royalty payments, the Tribe was obliged to secure compliance through its own initiative. The Tribe's actions are described in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F.Supp. 536, (D.N.M. 1979); *See* note 6 *infra*,

[1] The history of the various leasing acts is treated below under Point II.

[2] Section 4 of the 1938 Leasing Act, 25 U.S.C. §396d, provides that oil and gas leases issued on restricted Indian land shall be subject to rules and regulations promulgated by the Secretary of Interior. Amoco Appendix J at 3j. Pursuant to the Act the Secretary has adopted comprehensive regulations for supervision of oil and gas leasing and operations on Indian lands, compiled in 25 CFR Part 171 (Bureau of Indian Affairs) and 30 CFR Part 221 (Geological Survey).

p. 7. Also, the Tribe has taken its gas royalties in kind and actively protected its interests and rights under royalty gas gathering and exchange agreements negotiated with pipeline purchasers. *See Jicarilla Apache Tribe v. Federal Energy Regulatory Commission*, 578 F.2d 289 (10th Cir. 1978). The State of New Mexico has had no role in these matters. The Tribe further provides numerous services on the reservation supported from tribal revenues which benefit employees of the Petitioners as well as Indians, and which support Petitioners' operations. Testimony of Richard TeCube, *reprinted* Respondent's Appendix A.

The exaggeration by Amoco of the burden on the energy consuming public and the states of the tribal taxes exemplifies the efforts of the energy companies to exploit the resources of the Indian tribes with no concern for protection of the environment of "Indian Country", or for the social welfare of communities disrupted by energy development. Oil production on Indian lands in 1979 was only 0.77% of total U.S. production (23,873,120 barrels out of a total U.S. production of 3,107,610,000 barrels), and gas production on Indian lands was only 0.6% of total U.S. production (118,351,000 Mcf out of total U.S. production of 19,671,000,000 Mcf).[3]

If *all* of the 1979 oil and gas production on Indian lands in the United States were taxed by Indians at the Jicarilla Apache tribal tax rate, the total tax on all such Indian oil and gas production in the United States would be approximately $14,000,000, less than 2/10ths of 1% of the $7.4 billion of first quarter earnings, 1980, of 19 "Petroleum Products" companies. Wall Street Journal, April 30, 1980, at 22.

[3] *Federal and Indian Lands, Oil and Gas Production, Royalty Income and Related Statistics*, U.S. Department of Interior, Geological Survey, June 1980. Indian Production at 73; Total U.S. Production at 383.

Petitioners have suggested throughout these proceedings that tribal governments should be supported by taxation of tribal members alone. It is not credible that Congress intended tribes to support their governments by self-taxation leaving the giant corporations depleting their resources tax free, particularly in view of the congressional policy expressed in the Indian Reorganization Act, and the historical poverty of Indians and the meager resources of tribal governments. According to the 1970 census, the mean income of 149,122 Indian families in the United States in that year was $6,857; Indian per capita income was $1,573. 38.3% of all Indian individuals had income below the poverty level. The total income of all Indians in the United States was just over one billion dollars in that year.[4] The 1970 net earnings of five of the Petitioners - Atlantic Richfield, Conoco, Inc., Gulf Oil Corporation, Mobil Corporation, and Phillips Petroleum, totalled over 1.5 billion, greatly in excess of the total income of all the Indians in the United States in that year.[5]

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[4] Figures derived from the 1970 Census of Population, U.S. Department of Commerce Report, American Indians, Table 9.

[5] Total net earnings after taxes of the five companies mentioned quadrupled during the period 1970 to 1979, as reported by Standard & Poor's N.Y.S.E. Stock Report (Vol. 47, 1980):

	1970	1979	Page Reference
Atlantic Richfield	$ 206 million	$1,166 million	244
Mobil	$ 483 million	$2,007 million	1529
Gulf	$ 550 million	$1,322 million	1078
Conoco	$ 160 million	$ 815 million	606-U
Phillips	$ 117 million	$ 891 million	1826
Totals	$1,516 million	$6,201 million	

Official information is not yet available as to 1979 or 1980 per capita income of Indians in the United States, but it is doubtful if Indian per capita income has kept pace with that of the general population, much less with the earnings of the energy companies. In any event it seems clear that taxes such as those at issue in this case are vital to the survival of Indian governments, but have insignificant impact on the producing companies such as Petitioners.

Since enactment of the Indian Self-Determination Act, 25 U.S.C. §450, the tribes have taken an increasingly important role in the protection of their rights under mineral leases and protection of the environment of their reservations from irresponsible and unnecessary degradation. The Department of Interior has been neglectful in assisting the tribes in this effort. *Jicarilla Apache Tribe v. Supron Energy Corp.*, *supra*, at 540, 553[6].

Petitioners' statement that the Jicarilla tax imposes a significant burden on prices of oil and natural gas (Amoco Petition at 8) is not supported by the record. Obviously, all taxes have some effect on development and extraction of oil and gas and other minerals. But the effect of the Jicarilla tax on oil and gas prices is negligible. The Tribe made a detailed and comprehensive study of the impact of

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[6] The Court in *Jicarilla Apache Tribe v. Supron Energy Corporation*, described the Tribe's demands, beginning in 1973, that the Secretary take appropriate action to make determinations required of him under the terms of the oil and gas leases involved, and to require lessees to perform their obligations as required by the leases. The Court stated at 547:

> I find that, notwithstanding the unique and extensive effort given by the USGS to monitoring the Tribe's leases and defendants-lessees' adherence to the terms therein (footnote deleted), the Secretary has breached his fiduciary duty to insure for the Tribe that its lessees have complied with the term of the leases which requires diligent development.

The Court found that the Secretary had failed to monitor development of the leases adequately to ensure compliance with the terms of the leases and entered a declaratory judgment to that effect.

The Court further stated at 553:

> Plaintiff, like many Indian Tribes in recent times, has demonstrated its desire and ability to carry on business relations of its own, devoid of the paternalistic shroud in which it must be enveloped by the Secretary by virtue of the Tribe's legal status as a ward of the United States. It is Congress, however, and not the Court who is empowered to liberate the Indian Tribes from the protection imposed on them by the United States Government.

the tax on the consumer, which was considered by the Tribal Council of the Tribe prior to the enactment of the tax. The study established that the tribal tax would increase the cost of gas to New Mexico consumers by 6/10 of one cent per Mcf; the cost to interstate customers in California by 1/10 of one cent per Mcf; and that the impact on oil consumers would be insignificant.[7] *Reprinted* Respondent's Appendix B. Petitioners made no such study. There was no evidence to support the finding of the District Court that if producers were required to absorb the tax, it would substantially limit their ability to operate profitably some existing wells (Amoco Appendix C at 6c).[8]

The Jicarilla Apache severance tax will provide vitally needed revenues that will enable the Tribe to provide governmental services beneficial both to tribal members and to Petitioners at a minimal cost to the consumer. In any event the burden of non-discriminatory taxes on local transactions is a matter for the appropriate legislative body to consider, not the courts. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973).

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[7] Report of Dr. Alfred L. Parker. *The Economic Impact of a Proposed Oil and Natural Gas Severance Tax*, July 1976. Respondent's Appendix B.

Contrast the impact of the tax imposed by the Windfall Profit Tax Act of 1979, Pub.L. 96-223, 94 Stat. 229, which is also "an excise or severance tax on domestic oil producers and royalty owners" (Senate Report No. 96-394 at 2), the tax is expected to produce revenues of up to $15 billion a year from 1980 to 1990. *Id.* Table 1, at 10.

[8] The Court's finding was based entirely on the testimony of Thomas Dugan, which was directed to the burden of the tax on oil production. On cross-examination, Mr. Dugan testified as to only one "marginal" well which was a gas, not an oil well. Record, vol. IV, at 63—64. As to gas wells, he admitted he could pass on to consumers all of the tax. *Id.* at 55. There was no evidence whatsoever that the tax would tend to make any lease unproductive in paying quantities and subject to default.

The Commerce Clause issues raised by Petitioners are also spurious.[9] This case does not involve questions of either Indian or interstate commerce since the tax is levied on the privilege of severing oil and gas on the Tribe's reservation, a local event. Petitioners' strained construction of the tax ordinance was rejected by the Court of Appeals. Amoco Appendix A at 16a-20a. This will be addressed in Point IV below.

Petitioners equate tribal resources to publicly owned property and conclude from this erroneous premise that the development philosophy of a tribe is subject to scrutiny or even frustration by the states and the producers. Amoco Petition at 10. Congress has not delegated to the states and certainly not to the producers any authority with respect to "development philosophies" of the tribes. The Indian Reorganization Act made it clear that tribes were free either to develop resources or prevent their development:

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe, and to negotiate with the Federal, State, and local Governments. 25 U.S.C. §476, *reprinted* Amoco Appendix I.

The Constitution of the Tribe, approved by the Secretary of Interior, authorizes development of tribal lands and natural resources for industrial or other purposes, provided that such development is based upon sustained yield principles where applicable, and provided that such development is designed for the general welfare of the

[9] Amoco Petition, Point IV; M&B Petition, Point 4.

Tribe as a whole. Tribal Constitution, Article XI, §1(a)3, *reprinted* Amoco Appendix M.

In a brief filed in the District Court, the Merrion and Bayless Petitioners included the following quotation (Record, vol. I, at 46):

> Indians do not require oil to carry on their traditional economic and social activities. There is nothing about Indian culture which contributes to the value of oil or which should instill in Indians an appreciation for the substance, apart from the revenue it provides. Oil conservation is the vital concern of the white public, not the Indian, and the accident of the oil's location beneath public lands set apart for Indians does not reduce the need for its conservation in the interests of white culture.

Forgetting the above argument that oil conservation is the "vital concern of the white public", Petitioners now complain that the tribes might use their taxing power and restrict the development of their natural resources. M&B Petition at 6; Amoco Petition at 9-10. Since Congress has specifically authorized the tribes to adopt their own "development philosophies" and the Jicarilla Apache Tribe in its Constitution has authorized development based on the constraints mentioned, there is no justiciable issue as to "development philosophy" that merits the attention of this Court.

Congress has consistently acted to support tribal efforts to achieve self-determination and economic self-sufficiency and has acknowledged the continuing authority to levy taxes as a necessary adjunct to self-determination. Congressional expressions of current policy can be found in the Indian Self-Determination Act, 25 U.S.C. §450 and the Indian Financing Act of 1974, 25 U.S.C. §1451. The

power to levy severance taxes was expressly recognized in Section 110 of the Natural Gas Policy Act of 1978, 15 U.S.C. §3320, *reprinted* Respondent's Appendix C.

II

THE COURT OF APPEALS OPINION DOES NOT CONFLICT WITH THE PRINCIPLES OF COLVILLE; 25 U.S.C. §398c IS NOT APPLICABLE TO THE LEASES IN SUIT

Petitioners in both cases attempt to differentiate the severance tax at issue in this case from the *Colville* tax by asserting that tribal power to tax oil and gas production has been divested by federal law, that is, 25 U.S.C. §398c, and by the asserted overriding interest of the federal government encouraging uncontrolled development of mineral resources on Indian lands.[10]

Petitioners' argument that Congress pre-empted tribal taxation by authorizing state taxation of oil and gas production on Indian reservations under the 1927 Leasing Act 25 U.S.C. §398a, is refuted by the express recognition in Section 110 of the Natural Gas Policy Act of 1978 of Indian severance taxes. Respondent's Appendix C. State severance taxes are defined in Subsection (c) of Section 110 to include taxes imposed on the production of natural gas by any State or Indian tribe. It is thus clear that power to impose tribal severance taxes has not been divested by Congress, nor has Congress considered that any overriding national interest would be frustrated by this taxation.

Congress has not pre-empted the power to tax oil and gas by the Tribe in favor of the State of New Mexico. The authorization granted to the states to tax production on Indian lands contained in the 1927 Act, 25 U.S.C. §§398a-e,

[10] Amoco Petition, Points II and III; M&B Petition, Point 2.

was eliminated in the 1938 Leasing Act, 25 U.S.C. §§396a-g.

It became apparent to the Interior Department after the implementation of the Indian Reorganization Act of 1934 that various Indian leasing acts were in a patchwork state. F. Cohen, *Federal Indian Law*, 328 (U.N.M. ed.). Sections 2 and 3 of the 1927 Act, 25 U.S.C. §§398b and c, provided that proceeds from rentals, royalties or bonuses of such leases should be deposited in the Treasury of the United States to the credit of the particular tribe and should be available for appropriation by Congress for expenses connected with the supervision of the industry and for the benefit of the Indians, and authorized the Secretary to pay taxes out of "*the*" Tribal funds in the Treasury. This Act was inconsistent with the objectives of the Indian Reorganization Act which provided for management of tribal property and funds by incorporated Tribes. *Id.* at §§476, 477.

Acknowledging the confusion in the various Indian leasing acts, the Acting Secretary of Interior, Charles West, on June 17, 1937, transmitted to the House and Senate, a proposed comprehensive bill to govern the leasing of Indian lands for oil and gas and other minerals. *See* House Report No. 1872, 75th Congress, Third Session 1937. The Acting Secretary stated on page 3 of the Report:

> The attached draft of bill, it is believed, would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

Section 1 of the 1938 Act, 25 U.S.C. §396a, *reprinted* Amoco Appendix J, provided for leasing of tribal lands for oil, gas or mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians". Section 2 of the Act, 396b, provided for sale at public auc-

tion under regulations prescribed by the Secretary and included a further important addition as follows:

> *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476, and 477 of this title, to lease lands for mining purposes *as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to Section 461, 462, 463, 464-475, 476-478, and 479 of this title.* (emphasis added).

Section 7 of the 1938 Act provided:

> All Act[s] or parts of Acts inconsistent herewith are hereby repealed.

It is important to note that the emphasis of the 1938 Act was to provide for issuance of oil and gas leases by the tribes, specifically subject to provisions of tribal constitutions; that there was no requirement that the monies be paid into the treasury of the United States; and that there was no authorization for taxation by the states of production from lands leased under that Act.

The leases in this case were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-g. The lease attached to the Amoco Complaint (*excerpts reprinted* Respondent's Appendix D), provided in the "Forest and Land Protection Stipulations", which were an integral part of all leases, as follows:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Apache Reservation, the lessee hereby agrees: . . .

The District Court refused to require Petitioners to place their leases in evidence to prove the execution of the leases or the authority for the leases. Record, vol. VI, at

251. The only proof as to statutory authority for the leases was the certificate of Harold TeCube, the Jicarilla Agency Realty Officer, Bureau of Indian Affairs, filed with the Tribe's Motion for Leave to Amend Answer (10th Cir. Joint Appendix A at 117-21), which stated that the leases were issued under the 1938 Act.

The current federal regulations governing leasing of tribal lands for mining (including oil and gas), 25 C.F.R. Part 171, refer only to the 1938 Act and the Indian Reorganization Act as statutory authority for the regulations. The 1927 Act is not cited.[11]

Paragraph 3c of the Standard Lease Form dated November, 1947, attached to the Amoco Complaint (*reprinted* Respondent's Appendix D) provides that all rental and royalty payments, except as provided in Section 4(c) (royalty in kind) "shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day check or draft is issued, to the order of the Treasurer of the Tribe or the Superintendent." A footnote to Section 4(c) specifies that payment is made to the Superintendent only where the Tribe concerned is not organized under the Indian Reorganization Act. The Constitution of the Jicarilla Apache Tribe provides that the Tribal Council is responsible for management of all funds within the control of the Tribe and may appropriate available tribal money for public business and governmental purposes. Respondent's Appendix E, Constitution Article XI, §1(c),

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[11] The headnote following the Table of Contents of 25 C.F.R. Part 171 states:

AUTHORITY: Secs. 16, 17, 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4, 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250; 48 U.S.C. 358a, 362, unless otherwise noted.

SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted.

Tribal Funds. Thus, since rentals and royalties are paid directly to the Tribe and not deposited in the United States Treasury, there is no money with which to pay state taxes imposed pursuant to the provisions of 25 U.S.C. §398c. This is clear from the proviso of that section that "such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The lack of reference to taxation in the 1938 Act, together with the failure of Congress to continue the requirement that Indian royalties be paid into the Treasury, the failure to provide another manner of collection of taxes, and the express repeal of all inconsistent statutes, is clearly indicative of Congressional intent to eliminate the taxation provision of the 1927 Act with respect to leases let under the 1938 Act.

> . . . [T]he failure to set out former statutory provisions in a later comprehensive enactment will operate to repeal the omitted provisions which are inconsistent, and also former provisions which are repugnant to the later legislation. 1A *A. Sutherland, Statutes and Statutory Construction*, §23.13 (4th ed., 1972).

III

TRIBAL POWER TO TAX IS NOT LIMITED TO THE POWER TO EXCLUDE NON-MEMBERS FROM THE RESERVATION

Petitioners argue that the power to tax recognized in *Colville* appears to be based solely on the power to exclude non-members from the reservation or attach conditions to their entry. *Colville, supra* at 16. Amoco Petition, Point III; M&B Petition, Point 1.

This interpretation of the Court's decision in *Colville* is incorrect. The power of an Indian tribe to levy taxes is

an inherent attribute of tribal sovereignty and unless withdrawn by treaty or by an Act of Congress is "a proposition which has never been successfully disputed". F. Cohen, *Federal Indian Law*, *supra*, at 41.

The Constitution of the Tribe approved by the Secretary of Interior expressly provides for taxation of non-Indians doing business on the reservation. Article XI, §1(e), *reprinted* Amoco Appendix M. As stated previously in this Brief, Congress has not acted to deprive Indian tribes of the power to levy taxes of this kind on non-Indians using tribal lands or exercising privileges upon them. To the contrary, Congress has specifically recognized tribal severance taxes on natural gas in the Natural Gas Policy Act of 1978. *See p. 11 supra.* It is pointed out in *Colville* that courts have consistently upheld tribal power to tax. The cases cited in *Colville* need not be cited again here; however, the Court in *Morris v. Hitchcock*, 194 U.S. 384, 389 (1904) noted that "[t]he law in question seems to have a twofold object, — to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue." The first object was to impose the license or fee paid to the Tribe pursuant to the Tribe's power to exclude. The second object was to help support the tribal government pursuant to the Tribe's inherent power to tax. The Court upheld both as proper. The Court also noted with approval a similar tax imposed by the Cherokee Nation:

> And in the last-mentioned opinion it was, in substance, declared that, under §16 of the Curtis act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation, as

> their share of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised. *Id.* at 392.

The Chickasaw tax, approved June 3, 1902, was retroactively applied to stock within Chickasaw territory "since January 1, 1902," thus it was not based on the power to exclude non-Indians. *Id.* at 385 n. 1. The Cherokee tax referred to, imposed on removal of natural products severed from Indian lands by non-Indians, was strikingly similar to the severance tax now in issue.

The dual nature of most Indian taxes was again recognized and upheld by the District Court in *Confederated Tribes of Colville v. State of Washington*, 446 F.Supp. 1339 (E.D.Wash. 1978). The Court noted two objectives of the Tribe's tax as "the regulation of conditions under which cigarettes could be sold to Indians and non-Indians on the reservation, and to generate revenue for essential tribal governmental programs." *Id.* at 1361.

There is no conflict in recent decisions of the Courts of Appeals on the issue of tribal power to tax non-Indian activities on reservations, nor is there any likelihood of change of opinion when pending cases are decided.

Five of the cases mentioned by the Merrion and Bayless Petitioners on page 8, footnote 7, as a part of the "new flood of litigation" respecting Indian taxes, are pending in District Courts in the Tenth Circuit. The *Salt River Project* case mentioned in footnote 6 on that page and *Kerr-McGee Corporation v. Navajo Tribe* in the District of Arizona mentioned in paragraph 7 are in the Ninth Circuit. The Ninth Circuit Court of Appeals in *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (1976), *cert. denied*, 430

U.S. 983 (1977), found no problem with taxation both by the County of San Bernardino and the Tribe, strongly indicating that that Court would uphold tribal sovereign power to tax activities or property of non-Indians on trust lands.

The Eighth Circuit Court of Appeals is also in accord. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (1956), cited with approval in *Colville*, a "tax" was specifically upheld. The Court very clearly set forth the facts of the case and stated that the "plaintiff has leased some of his land within the Pine Ridge Reservation for grazing purposes to *non-members* of the Oglala Sioux Tribe" (emphasis in original) and that the Tribe had "*assessed a tax against plaintiff's lessee* for the privilege of grazing stock on land within the reservation . . ." (emphasis added). *Iron Crow*, *supra*, at 90. As in the present case, the non-Indian lessee was already on the reservation pursuant to an authorized lease. Thus, the power to exclude could not have been the basis for the Court's approval of the tax because the Tribe could not exclude or remove the holder of a valid lease. The Court held that the Oglala Sioux Tribe still retains its inherent sovereignty except where it has been taken away either by treaty or Congressional action. *Id.* at 94. The Court added that the Tribe properly provided for "the levy of taxes" in its constitution "in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476." *Id.* at 99. Finally, the Court stated:

> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists. *Ibid.*

The Court upheld the Sioux tax, making no distinction between a tax and a license.

The language in *Colville* is not susceptible to the narrow interpretation sought by Petitioners. This Court stated:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. *Colville, supra*, slip op. at 15.

Tribal interest in raising revenues for essential governmental programs "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services" *Id.* at 20. The Jicarilla Apache Tribe is vigorously protecting its gas and oil resources (*Jicarilla Apache Tribe v. Supron Energy Corp.*, note 6, p. 7 *supra*) and provides substantial services to Petitioners. *See* p. 5 *supra*.

The Amoco Petitioners argue that the severance tax unilaterally increases the royalties payable by lessees. The power to tax cannot be limited by implied exemptions or limitations. The power of the State of New Mexico to increase its severance taxes from time to time on production from state lands, leased to taxpayers with rental and royalty rates fixed by the lease terms has never been questioned. The cases cited by Petitioners, *Puerto Rico v. Russell & Co.*, 315 U.S. 610 (1942), and *Murray v. Charleston*, 96 U.S. (6 Otto.) 432 (1877) are not in point. They hold that a special tax or assessment may not be levied for the purpose of relieving a government of its indebtedness (*Murray, supra*) nor can special assessments be imposed

for maintenance and operation where earlier contracts had exempted the Respondents from contributing to such costs. (*Puerto Rico, supra*) This Court in *Wells v. Savannah*, 181 U.S. 531 (1901), and again in *Puerto Rico*, made clear that general taxes laid for the support of government could only be avoided by clear proof of a valid contract of exemption from such payments. The Jicarilla Apache Tribe has never exempted Petitioners or waived its power to tax either expressly or impliedly.

IV

THERE ARE NO SUBSTANTIAL QUESTIONS RAISED AS TO INTERFERENCE WITH INTERSTATE OR INDIAN COMMERCE

A. The Tribal Tax Does Not Discriminate Against Interstate Or Indian Commerce.

The Jicarilla Apache severance tax is an excise or privilege tax on the business of producing oil and gas on the Tribe's reservation measured by the volume of production at the wellhead. By the language of the Tribal tax ordinance it is "imposed on any oil and natural gas severed, saved and removed from tribal lands", that is, extracted from tribal soil. It is levied on all crude oil, condensate and natural gas "produced" on the reservation. Ordinance, paras. 2 and 3, *reprinted* Amoco Appendix N at 1n. The tax is paid by the operator of each well. Each operator is required to file a return showing the "total volume of oil, gas and condensate, and BTU of gas produced from each well each calendar month . . ." *Id.* para. 6. The taxable event on which the tribal tax is imposed is the severing, saving and removal of oil and gas from reservation soil.

Paragraph 4 of the Ordinance exempts only "royalty gas, oil or condensate taken by the Tribe in kind, and used

by the Tribe." Paragraph 1 states that "taxes shall become due at the time of severance"; paragraph 5 requires the "operator of each well" to pay the tax; and paragraph 6 requires each operator to report the production from each well.

The Amoco Petitioners argue that the language "severed, saved and removed from tribal lands" means that the tax only applies to oil and natural gas which is removed to points outside the reservation boundaries, while in fact the clear intent is to apply the tax to the removal of oil and natural gas from the earth *within* the exterior boundaries of the reservation. Petitioners cite the language "produced on the Jicarilla Apache reservation and sold or transported off the reservation" as evidence of the tax's discriminatory nature. Amoco Petition at 21. These words were designed to ensure that all oil and gas not used by lessees in aid of production, or used by the tribal government for tribal purposes, would be subject to the tax. All oil and all gas, except pipeline production, is sold at the wellhead. Pipeline producers transport their production off the reservation without sale, hence the necessity for the wording "transported off the reservation". The language of the tax ordinance ensures the equal taxation of all oil and gas produced on the reservation, including pipeline production, exempting only that used by lessees in aid of production or used by the Tribe for tribal governmental purposes. This Court has specifically upheld this type of classification and exemption in *Utah Power and Light Co. v. Pfost*, 286 U.S. 165 (1932).

The Courts have unanimously held that production or mining of natural resources is a distinctly local event, occurring before the products move into interstate commerce. Taxes which are applied evenhandedly to sever-

ance of minerals do not impose an unconstitutional burden upon commerce nor do several such taxes constitute multiple taxation on commerce because commerce has not begun. *Oliver Mining Co. v. Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927).

Utah Power and Light Co., supra, implies that exemption for the benefit of tribal members would not be fatal to the tax. *See also, The Indian Preference Acts*, 25 U.S.C. §§44, 46, 47, 274, 472; *Morton v. Mancari*, 417 U.S. 535 (1974).

In *Hope Natural Gas Co. v. Hall, supra*, this Court dismissed the objection that the West Virginia statute taxing gas production would subject gross receipts derived from interstate commerce to the tax, stating:

> The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, thereafter, executive officers disregard the approved construction and fixed values upon any improper basis appropriate relief may be obtained through the courts. *Id.* at 288.

Like the tax in the *Hope Natural Gas Co.* case, the volume of production on which the tribal tax is measured and determined is at the wellhead in every case, as provided in paragraph 6 of the Ordinance. Measurement must necessarily be taken at the wellhead because the gas is commingled with gas from other wells when taken into gathering lines. Crude oil is stored at holding tanks at the side of each well and taken off from the well site in a tanker truck or pumped into a pipeline, where it may be commingled with oil from other wells. Measurement of oil production therefore must thus also be taken at the wellhead.

There is no evidence whatsoever that any local business gains a direct commercial advantage over a business off the reservation or outside the State of New Mexico because of the tax. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959).

B. The Tribal Tax Does Not Impose A Multiple Burden On Interstate Commerce, Prohibited By The Constitution.

This argument addresses Point IV B, page 23 of the Amoco Petition and Point 4, page 26 of the Merrion and Bayless Petition.

Petitioners claim, contrary to the holding of the Court of Appeals, that the tribal severance tax constitutes a unlawful multiple burden on interstate commerce based on the fact that both the Tribe and the State of New Mexico levy taxes on the production of oil and gas on the Jicarilla Apache reservation. New Mexico imposes six separate taxes on oil and gas production or equipment: the Oil and Gas Severance Tax, N.M. Stat. Ann. 1978, §§7-29-1 to -22; the Oil and Gas Conservation Tax, §§7-30-1 to -26; the Oil and Gas Emergency School Tax, §§7-31-1 to -25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to -27; Natural Gas Processors Tax, §§7-33-1 to -22; and Oil and Gas Production Equipment Ad Valorem Tax, §§7-34-1 to -20. Petitioners claim in effect that an Indian tribe will be precluded from levying any tax on an item later transported off the reservation simply because the State in which the reservation happens to be located has exacted one or more taxes on the same item.

Thus, Indian tribes would be denied the right, possessed by other governments, to tax local transactions on

the reservation if the state in which they are located exacts a similar tax. Such interference with tribal self-government has been expressly prohibited by this Court in *Williams v. Lee*, 358 U.S. 217 (1959). This Court in *McClanahan v. Arizona Tax Commission, supra* at 179, considered this potential conflict in circumstances involving non-Indians and stated as follows:

> In these situations, both the tribe and the State can fairly claim an interest in asserting their respective jurisdictions. The Williams test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

Petitioners argue that the additional burden of the one tribal severance tax in itself imposes an unconstitutional multiple burden on commerce although the six separate taxes imposed by the State are legally harmless. Amoco Petition, Point IV B; M&B Petition, Point 4.

The evidence at the trial was undisputed that the State of New Mexico provides only minimal services on the reservation. The Tribe tendered proof, denied admission by the Court, as to the substantial services provided by the Tribe out of tribal funds. Respondent's Appendix A. Whether the State's services provided on the reservation justify any state tax, and whether such taxes interfere with Indian self-government, are not at issue in this case. Nevertheless, there is no constitutional prohibition against local taxation by two governments with overlapping jurisdiction. The decision in *Fort Mojave Tribe v. San Bernardino County, supra*, presents a situation in which the *Williams* test was applied to possessory interest taxes levied by both the State and the Tribe on non-Indian lessees of tribal trust lands. The existence of the two

taxes was not a problem for the Court of Appeals which stated,

> There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. *Id.* at 1258.

It was not the purpose of the Commerce Clause of the Constitution to relieve those engaged in interstate commerce from their just share of local tax burdens even though it increases the cost of doing business, *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938). Prohibited taxes are those which may be disproportionately imposed after products begin to move in commerce by every state through which the products move. *General Motors Corporation v. Washington*, 377 U.S. 436, 440 (1964).

There is no constitutional ban upon the imposition of non-discriminatory local taxes by two taxing authorities having jurisdiction. *Fort Mojave Tribe v. San Bernardino County, supra.* Double taxation is a fact of modern life. *Colville, supra,* at 21-22.

V

THE JICARILLA APACHE TRIBE HAD AN ORGANIZED AND EXISTING SOVEREIGN GOVERNMENT AT THE TIME OF THE UNITED STATES OCCUPATION OF NEW MEXICO

The Merrion and Bayless Petitioners state on page 11:

> Tracing the source of tribal authority to tax to the power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing sovereign government at the time the Constitution was signed. As Chief

> Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression.

It is respectfully submitted by Respondents that this Court should not review the history of any particular Indian tribe to determine the source and extent of its sovereignty at the time of American occupation of tribal territory. Nevertheless, since the issue has been raised by Petitioners, a response which will establish that the argument is totally without historical foundation seems appropriate.

The Indian Claims Commission in *Jicarilla Apache Tribe v. United States*, in Findings of Fact and Opinion issued August 26, 1963, found and held that the Tribe occupied and held aboriginal Indian title from time immemorial to an area comprising the major portion of northeastern New Mexico. 12 Ind Cl. Comm. 439, 467-68, 484-86. While it is true that in ancient times the ancestors of the Jicarilla Apache Tribe hunted in bands because of the large area needed to provide subsistence, nevertheless, these bands were amalgamated and identified as the Jicarilla Apache Tribe long prior to American occupation.[12]

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[12] Findings of the Indian Claims Commission established that the ancestors of the Jicarilla Apache Tribe settled in locations in northeastern New Mexico and southeastern Colorado after their migration from the north in the 11th century. *Id.* at 443-44. According to their creation legend they were made up of two basic groups representing the merger of two peoples; the Olleros were mountain people, and the Ilaneros were plains people. The language, culture and economy were the same; they were familiar with each other's terrain and commonly hunted and engaged in food gathering together, and shared ceremonial relay races held each year. *Id.* Findings 8 and 9 at 444-45.

Contrary to the statement of Judge Seth that the Jicarilla Apaches were composed with small groups with no geographical

Obviously, hunting and gathering tribes of Indians occupying extensive areas in the arid southwest did not have the same tribal cohesiveness as did the Pueblos, but did have attributes of sovereignty to which the organized tribes succeeded. The sovereignty of the Apache Tribes in New Mexico was recognized by officials of the United States who commenced negotiation of treaties with tribal chiefs the year after the ratification of the Treaty of Guadalupe Hidalgo. These actions were inconsistent with Judge Seth's theory that "there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy Pueblos". Amoco Appendix at 33a.

General Choice and Colonel Charles May of the U.S. Army attempted to negotiate a treaty with the various tribes of Apaches in December 1849. 12 Ind. Cl. Comm. at 459. Governor Calhoun and Colonel Monroe executed a peace treaty with Chacon, Lobo, Guero, and Josecito, who were respectively *principal chief* and subordinate captains

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Footnote continued
significance or relationship to any other group (M&B Appendix A at 32), the Indian Claims Commission found that some Apache bands north of the Pecos had lost their separate identities and became merged with the Jicarilla Apaches about the middle of the 18th century. *Id.* Finding 28 at 453. The Commission also stated:

> 30. *The bands of Apache Indians which formed the Jicarilla Apache Tribe during the Spanish period of occupancy* maintained homes in mountain areas along the east of the Rio Grande River in northeast present New Mexico where they practiced agriculture; and hunted to the south, north and to the east thereof on the edge of the buffalo plains, sometimes venturing northward to the Arkansas River and westward of the Rio Grande River. Finding 30 at 454. (emphasis added)

In 1786 Governor Anza stabilized the New Mexico frontier by a treaty of peace with the Comanches, thus recognizing the sovereignty of that warlike hunting tribe. *Id.* Finding 28 at 453. The population of the Jicarilla Apache Tribe in 1848 was approximately 1750 Indians. *Id.* Finding 20 at 449.

of "the Apache Indians East of Rio Del Norte" (Jicarillas). This treaty was not confirmed. In 1852, a treaty was executed by Indian Agent John Greiner and Colonel Sumner with certain principal chiefs of "the Apache Nation", probably Mescalero chiefs, and ratified by the U.S. Senate. *Id.* at 461. Another treaty was negotiated with the Jicarilla Apaches by Governor Lane in 1853 which was not approved by the Commissioner of Indian Affairs. *Id.* at 462. In 1855 Governor Meriwether negotiated a treaty of peace with the "Jicarilla Band of the Apache Nation" providing for a Jicarilla reservation and extinguishment of Indian title to all Jicarilla lands within New Mexico. This treaty was not ratified because of white settler's claims to the reserved lands proposed. *Id.* at 463-465.

F. Cohen, *Federal Indian Law*, *supra* at 33-34, placed the relationship of treaty making to sovereignty in perspective as follows:

> That treaties with Indian tribes are of the same dignity as treaties with foreign nations, is a view which has been repeatedly confirmed by the federal courts and never successfully challenged.

In *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 748-49 (1835), the Court said:

> [*A*]*ccording to the established principles of the laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign.* The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting-grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. (emphasis supplied)

Recognition of aboriginal title, it is submitted, implies recognition of tribal sovereignty limited by the rights of discovery and conquest by the European powers. The European powers, including Spain, recognized aboriginal title in the hunting tribes, as well as in the Pueblos and other sedentary tribes, and made treaties with the hunting tribes. *See* note 12 *supra.*

The United States is the paramount sovereign as to lands acquired from Mexico, as it is paramount as to lands acquired from England or France. The Treaty of Guadalupe Hidalgo is silent as to treatment of Indian customs or laws and is irrelevant to the questions at issue. There was no alteration of these customs or laws, thus they remained in force, as stated in *Mitchel.* The argument of Petitioners, that the Apache tribes in New Mexico retained no vestiges of government powers, if valid, would apply to the Pueblo Indians as well. The difficulties of integrating tribal sovereignty into the dual federal-state system created by the Constitution, mentioned in page 12 of the Merrion and Bayless Petition, is again irrelevant to the issues of this case.

VI

THE QUESTION OF CONSTITUTIONAL PROTECTION AGAINST ABUSES OF TRIBAL AUTHORITY IS NOT AT ISSUE IN THIS CASE

The Merrion and Bayless Petitioners state that there is an important question of federal law which has not been but should be settled by this Court with respect to the extent of constitutional guarantees which should be extended to non-Indians as a protection against "the excesses of any sovereignty found to exist in Indian tribes". These Petitioners assume that the enforcement of tribal

taxation may result in the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property, and that criminal jurisdiction may be required. M&B Petition, at 24 n. 16. This "parade of the horribles" could apply equally to arbitrary action of tribal authorities or individual Indians if they shut down Petitioners' oil or gas wells, shut off their roads, or denied access to their production facilities without presumed authority of tribal legislation. Enforcement of tribal taxation can be obtained by civil action, authority for which was again recognized in *Colville*, *supra*, slip op. at 15.

If at any future time, tribal authorities act beyond their authority and jurisdiction to jeopardize the property rights of non-Indians, only then would it be appropriate for the Court to determine the nature and extent of constitutional guarantees to be extended as protection against "the excesses of any sovereignty found to exist in Indian tribes", whatever that may mean. M&B Petition, at 22; *See Hope Natural Gas Co. v. Hall*, *supra*.

The argument that persons should not be subjected to occupation or license taxes without the right to participate in the government imposing such taxes is one that has long since been settled adversely to Petitioners. The Circuit Court of Appeals of the Eight Circuit in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553, 557 (1958), *cert. denied*, 358 U.S. 932 (1959), in discussing a license tax levied by the Oglala Sioux for grazing and farming on their tribal lands by non-members of the Tribe, stated as follows:

> It is finally argued that the tax is violative of defendants' rights in that it constitutes taxation without representation. If it be conceded that the act of the tribe in levying this tax constitutes taxation without representation that alone is certainly not fatal. The taxability of property is not de-

pendent upon the residence of the owner of the property. The property rights of an alien or non-resident are taxable the same as the property of residents who may be said to have representation. As said in *Thomas v. Gay*, 169 U.S. 264, 277 (1898) cited by defendants:

> Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. (Citing cases) So, likewise it is settled law that the property, both real and personal, of non-residents may be lawfully subjected to the tax laws of the state in which they are situated.

Many taxes might be similarly characterized and it cannot be said that the license tax was the exercise of arbitrary power. It was levied uniformly on all lessees of these tribal trust lands.

See also Hagar v. Reclamation District, 111 US 701, 709 (1884).

(Continued with Conclusion)

CONCLUSION

Respondents respectfully submit that there are no substantial questions of law raised by Petitioners that have not already been decided by this Court adversely to Petitioners, nor are there conflicts in the decisions of the Circuit Courts of Appeals as to the issues raised herein. Approval by this Court of the tribal power to impose severance taxes on non-Indians will subject Petitioners' exploitation of mineral resources on tribal lands to reasonable regulation and taxation by the Jicarilla Apache Tribe, scarcely a "far reaching consequence" detrimental to the national interests. The Petitions for Certiorari should therefore be denied.

Dated: 25 August, 1980.

Respectfully submitted,

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Nos. 80-11 and 80-15

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In the Supreme Court of the United States

OCTOBER TERM, 1979

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-11

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

No. 80-15

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

At issue in this case is the validity of an ordinance of the Jicarilla Apache Tribe imposing a severance tax on the extraction of oil and gas from tribal lands within its Reservation (80-15 Pet. App. 1n-6n), an area set apart and defined by a series of Executive Orders between 1874 and 1912 (*id.* at 11-61). The Tribe's mineral lessees challenged the ordinance and the United States District Court for the District of New Mexico struck down the

tribal tax on a variety of grounds (*id.* at 1c-8c). The court apparently believed that the Tribe never enjoyed the power to tax non-members, whether before or after the Indian Reorganization Act of 1934 (*id.* at 7c-8c). At all events, the district court concluded that, by enacting 25 U.S.C. 398c in 1927 (*id.* at 1h-2h), Congress granted the States exclusive authority to tax the severance of oil and gas on Reservations established by Executive Order (*id.* at 7c). And, finally, the tribal ordinance was held to impose "an unlawful multiple burden on interstate commerce" and unconstitutionally to discriminate against that commerce (*ibid.*). Addressing each of these questions, the court of appeals, sitting en banc, reversed (*id.* at 1a-30a), two judges dissenting (*id.* at 30a-41a, 41a-64a). Rehearing was denied (*id.* at 1b-2b).

In our view, the decision of the court of appeals is plainly correct and does not merit review here. That would not have been so clear but for this Court's intervening decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980). In the light of that ruling, however, the instant case presents no seriously arguable question of general importance not already authoritatively settled.

1. In *Colville* this Court expressly held that Indian Tribes generally retain as "a fundamental attribute of sovereignty" the power to tax non-Indians in respect of transactions occurring on their lands and "significantly involving [the] tribe or its members." Slip op. 15. That principle was there applied to sales of cigarettes imported from out-of-state and sold primarily to outsiders in circumstances which led the Court to observe that it was "painfully apparent that the value marketed by the smokeshops * * * is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 18. It hardly requires argument to conclude that, unless Congress has otherwise decreed, the tribal power of

taxation also survives in respect of extraction of a vital natural resource of the Reservation—an activity far more intimately associated with the Indian land situs and more immediately implicating tribal interests.

2. It would be frivolous to suggest that the Jicarilla Apache Tribe lacks the power of taxation, or enjoys a lesser prerogative, because its present Reservation was established by Executive Order. To be sure, this Court has held that lands temporarily set aside for Indians without benefit of a treaty or Act of Congress could be returned to the public domain without any obligation under the Fifth Amendment to pay just compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Ute Indians* v. *United States*, 330 U.S. 169 (1947). See also *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103-110 (1949). But it hardly follows that a Tribe enjoying an Executive Order Reservation has no interest in the land or natural resources within those boundaries, even after almost a century of continuous possession has elapsed. There are today no "temporary" Indian Reservations. Congress ended the creation of new Indian Reservations by the Executive in 1918 and 1919 (25 U.S.C. 211; 43 U.S.C. 150), and, more importantly, since 1927, the President has been forbidden to abolish or diminish Indian Reservations so created. 25 U.S.C. 398d. For several decades, at least, it has been accepted that, unless it is expressly provided otherwise in the instrument creating the Reservation or in a later Act of Congress, every Tribe is entitled to enjoy comparable benefits from the timber, the minerals, and the waters of its Reservation, regardless of the method by which it was established. In many instances, that understanding is reflected in federal legislation. *E.g.*, 25 U.S.C. 398b-398c, 407, 461. And this Court has indicated the same view. See, *e.g.*, *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941); *Metlakatla Indians* v. *Egan*, 369 U.S. 45, 58-59 (1962);

Arizona v. *California*, 373 U.S. 546, 596-598 (1963). Cf. *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 1-4, 10-11; *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 8-13.

At all events, there is no basis whatever for distinguishing between the residual sovereignty of Tribes whose lands were set apart by Executive action and others whose title is recognized by treaty or Act of Congress. Since tribal sovereignty is a residuum of aboriginal independence, and not a grant from the United States, it cannot vary according as the National sovereign has defined an Indian Reservation by one means rather than another. See *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). The recent *Colville* decision has settled that the tribal power to tax is an aspect of that residual sovereignty. Slip op. 15-17. Indeed, by expressly recognizing the authority of the Colville Tribes to tax activities on their Reservation, established by Executive Order (*id.* at 6 n.12), as no less than the similar power of the Lummi and Makah Tribes, whose Reservations were created by formal treaties (*id.* at 6 nn. 13 & 14), the Court has foreclosed the argument.

3. Although it is plain that the Jicarilla Apache, like every other Tribe with a recognized territory, continued to enjoy the power to tax activities on their Reservation significantly touching tribal interests long after they came under the protection of the United States, we must consider the possibility that the Tribe was later "divested of [that power] by federal law." See *Colville*, *supra*, slip op. 15. We submit no such finding properly can be made here.

The suggestion appears to be that the Act of Mar. 3, 1927 (ch. 299, 44 Stat. 1347, 25 U.S.C. 398a-398c), by permitting State taxation of mineral production on Indian Reservations created by Executive Order, ousted any

tribal power to tax the same activity. But the argument proves too much. In all relevant respects, the 1927 Act merely makes applicable to Executive Order Reservations the leasing and taxing provisions already enacted in 1924 for Indian Reservations established by treaty or Congressionally ratified agreement.[1] See Act of May 29, 1924 (ch. 210, 43 Stat. 244; 25 U.S.C. 398). Thus, the rule suggested would disable almost all Indian Tribes from

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[1]The 1924 Act only applied to tribal lands "subject to lease for mining purposes * * * under the proviso to section 3 of the Act of February 28, 1891," which were there described as "lands * * * occupied by Indians who have bought and paid for the same." 26 Stat. 795; 25 U.S.C. 397. The Department of the Interior had construed this language as excluding reservations created by Executive Order, and, indeed, some established by Act of Congress where no consideration passing from the Indians was recited. See *British-American Oil Producing Co.* v. *Board of Equalization of Montana*, 299 U.S. 159, 161-164 (1936); Solicitor's Memorandum of January 12, 1937, in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs* 714, 715 (1979). And the General Leasing Act (Act of Feb. 25, 1920, ch. 85, 41 Stat. 437), which authorized mineral leasing on lands "owned by the United States," did not apply to Executive Order reservations. 34 Op. Att'y. Gen. 181 (1924). Hence, the need for the 1927 Act. *British-American Oil Producing Co.*, *supra*, 299 U.S. at 162. Even then, there was believed to be no authority for mineral leasing of tribal lands in some congressionally established reservations not covered by the Indian Reorganization Act (see 25 U.S.C. 476-477). This, and the need to bring uniformity into the leasing of tribal lands, led to the passage of the comprehensive Act of May 11, 1938, ch. 198, 52 Stat. 347; 25 U.S.C. 396a-396g. (Other purposes of the Act were to bring leasing of tribal lands into harmony with the Indian Reorganization Act and to rectify the failure of existing law to give the Indians the greatest return from their property. S. Rep. No. 75-985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 75-1872, 75th Cong., 3d Sess. (1938)).

It was argued below that the 1938 statute superseded the 1924 and 1927 legislation and effectively repealed the earlier congressional consent to State taxation of Indian mineral production. See 84 I.D. 905. Because it concluded that the 1927 Act was not intended to divest the Indians of the power to impose a severance tax, and that such a tribal tax, even in addition to one levied by the State, did not constitute a multiple burden on interstate commerce, the court of

taxing mineral production, even when derived from assets unquestionally confirmed to them by solemn treaty. See *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938). We cannot assume that, without saying so, Congress intended such a result, effectively abrogating an essential power of self-government which the Nation had agreed to respect. Cf. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968). As the court of appeals found (80-15 Pet. App. 22a), nothing in the legislative history of the 1927 Act supports a different rule for Executive Order Reservations.

There is, moreover, no contradiction in removing a tax immunity while preserving the power to tax. Sufficient examples are the provisions of the Hayden-Cartwright Act (4 U.S.C. 104) and the Buck Act (4 U.S.C. 105-110) which permit State taxation of activities within other federal enclaves without affecting the concurrent power of the United States to impose its own like taxes. See 4 U.S.C. 108. Indeed, the 1924 and 1927 legislation affecting Indian Reservations belongs to the same philosophy of eliminating what was viewed as "tax favoritism." See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 610 (1943). In that day, both the Indians and their lessees were deemed exempt from State taxation on the basis of the federal instrumentality doctrine, which was not fully repudiated by this Court until two decades later. See *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342 (1949). In that setting, it seems obvious that the removal of a special exemption was not meant to disturb existing tribal powers. At all events, it would require much more than mere silence to justify imputing to

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appeals found it unnecessary to decide whether New Mexico's taxes are lawful, especially in the absence of the State as a party (80-15 Pet. App. 20a, 22a n.5). The question is not presented to this Court and we do not address it. For present purposes, we assume the taxing provision of the 1927 Act (25 U.S.C. 398c) remains effective.

Congress such a destructive intent. See, *e.g.*, *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

That there is no anomaly in the co-existence of State and tribal authority to tax the same transaction is of course confirmed by this Court's decision in *Colville*. Nor is it any longer arguable that any practical economic obstacle to burdening the taxpayer with both taxes invalidates either of them. It may be doubted whether petitioners, or their competitors, will in fact be deterred by the cumulative taxes. But the *Colville* case teaches us that even the total destruction of a business is irrelevant in determining taxability. There, the focus was on the State tax. Plainly, however, the same principle governs in assessing the tribal power to tax. Here, indeed, there is far more room for an accommodation, if the total tax burden proves excessive. In that event—absent Congressional intervention—it will be for the State and the Tribe to determine how best to tailor their taxes to their economic interest—a familar question of policy well beyond the jurisdiction of courts.

4. We notice, finally, the contention that the tribal tax offends the Commerce Clause because it unduly burdens, or discriminates against, interstate commerce. The charge is quickly answered.

At the outset, it may be doubted whether the Commerce Clause, any more than other provisions of the Constitution, controls the action of Indian Tribes. See *Talton* v. *Mayes*, 163 U.S. 376 (1896), re-affirmed in *United States* v. *Wheeler*, *supra*, 435 U.S. at 328-329. See, also, *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 194 n.3 (1978). Thus, it presumably remains true that Tribes, unlike States, can close their borders to outsiders, see *Morris* v. *Hitchcook*, 194 U.S. 384, 393 (1904), notwithstanding the constitutional right of interstate travel which may be rooted in the Commerce Clause. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 630 n.8 (1969);

United States v. *Guest*, 383 U.S. 745, 758-759 (1966); *Edwards* v. *California*, 314 U.S. 160, 172-174, 177 (1941). So, also, we assume that, absent controlling Acts of Congress, an Indian Reservation government may ban or limit the importation or exportation of goods in circumstances forbidden to the States. Subject only to Interior Department approval, nothing prevents the Tribes themselves from enacting the same restrictive commercial code that federal legislation once imposed for their benefit, and, to some degree, maintains today. See 25 U.S.C. 81, 177, 251-264; *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *Central Machinery Co.* v. *Arizona State Tax Commission,* No. 78-1604 (June 27, 1980).

Certainly, the Indian Commerce Clause is no obstacle. To be sure, that provision, in some situations at least, operates as a restraint. See *Colville*, *supra*, slip op. 10-11, 20; *White Mountain Apache Tribe* v. *Bracker*, *supra*, slip op. 6-8. But it has never been suggested that the Indian Commerce Clause, of its own force, limits tribal powers that survived the submission of the Indians to federal authority. On the contrary, it shields the Tribes from undue State and local interference and permits the Congress to preempt white-Indian intercourse with protective, even preferential, regulation. See *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974); *United States* v. *Antelope*, 430 U.S. 641, 645-647, 649 n.11 (1977). The thrust of the Clause is to set Indian commerce apart for special regulation. It is not governed by the complex of rules developed under the Interstate Commerce Clause. See *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959).

We need not press the point, however. Even if Indian Tribes, by necessary implication of their dependent status, are divested of the power unduly to interfere with the free

flow of interstate commerce, there is nothing of that kind in this case. The challenged tribal ordinance does not single out products destined for sale beyond New Mexico. Although, as it happens, most, but not all, of the oil and gas sold is transported out of state, that is a matter of complete indifference to the Tribe, whose severance tax applies indiscriminately whether or not the minerals leave New Mexico. The exemption for production taken and used by the Tribe as royalty in kind is, of course, not a preference for intrastate sales. In effect, the Tribe, being both owner and taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other. There is thus no arguable discrimination against interstate commerce.[2]

Nor does the tribal ordinance impose any impermissible multiple burden on interstate commerce. Once again, the *Colville* decision forecloses any objection. The Tribe is taxing a local event—severance—occurring wholly within the Reservation. The anomaly here is that the State is (we assume, *arguendo*) permitted to tax the same activity. But for express Congressional authorization (which may long since have been repealed, see note 1, *supra*), that intrusion would be barred under the principles recognized in *White Mountain Apache Tribe* and *Central Machinery Co.*, *supra*. In these circumstances, the Tribe can hardly be found guilty of unwarranted double taxation.

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[2]Nor is there any discrimination as between producers subject to the Tribe's jurisdiction. The tax applies to any operator extracting oil and gas on the Reservation, including tribal members (80-15 Pet. App. 17a).

For these reasons, we urge denial of the petitions for a writ of certiorari.

Respectfully submitted.

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AUGUST 1980

DOJ-1980-08

No. 80-11

IN THE

Supreme Court of the United States

SEP 19
MICHAEL RODAK

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT JICARILLA APACHE TRIBE'S BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

NO. 80-11

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
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PETITIONERS' REPLY BRIEF TO RESPONDENT JICARILLA APACHE TRIBE'S BRIEF IN OPPOSITION

POINT I

Neither the Federal Congress, Executive or Judiciary has Recognized Tribal Power to Tax Federally Approved Lessees.

In its Brief in Opposition the Respondent Jicarilla Apache Tribe has raised new issues regarding Congressional recognition of tribal power to tax non-Indians. The Respondents point to Section 110 of the Natural Gas Policy Act of 1978 as recognition of Indian severance taxes. (Respondent's Brief, page 11) and then state: "To the contrary, Congress has specifically recognized tribal severance taxes on natural gas in the Natural Gas Policy Act of 1978." (Respondent's Brief, page 16). Since the interest of the federal government in Indian taxation of non-Indians is a critical element, it is important to set the record straight on the intent of Congress in adopting the Natural Gas Policy Act.

It is true that 15 U.S.C. §3320 does define state severance taxes for purposes of allowing a pass through to consumers to include those levied by an Indian Tribe. It is not true, as Respondents contend, the "[t]he power to levy severance taxes was expressly recognized" in Indian tribes. (Respondent's Brief, page 11). To the contrary, Congress went out of its way to disclaim any intent to grant Indian tribes the power to tax oil and gas leases lawfully operating on Indian reservations under federal authority. The Conference Committee specifically recognized that *this case* would "determine the legality of imposing such taxes", saying:

> The conferees do not intend to prejudice the outcome of cases on appeal before the Tenth Circuit Court of Appeals respecting the right of tribes to impose taxes on persons or organizations other than Indians who are engaged in business activity on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes. (Citing Petitioners' cases). Conference Report on H.R. 5289, 95th Congress, 2d Sess., Rept. No. 95-1126.

See also discussion of this question in Judge Barrett's dissenting opinion below. (Petitioners' Appendix, page 60).

The Natural Gas Policy Act of 1978 clearly cannot be deemed a grant or confirmation of the Tribe's power to tax for at least three reasons: (1) Congress made it explicit that it was not prejudging the outcome of these cases, but was simply providing for a "pass through" of Indian taxes in the event they were held to be valid; (2) any such tribal taxes that were passed through under this section could be founded upon the admitted right of Indian tribes to condition initial entry upon the reservation, and (3) as pointed out by Judge Barrett in his dissent, nothing in the language of the Natural Gas Policy Act of 1978 can be interpreted as a Congressional grant of power to Indian tribes to enact and levy tribal severance taxes. (Petitioners' Appendix, pages 60-61). If anything, the Natural Gas Policy Act of 1978, when considered as a whole, supports the argument that the

Indians do not have the power to tax federally approved lessees as an attribute of sovereignty, and that such tribal powers of taxation would be inconsistent with tribal dependent status.

The Windfall Profit Tax Act of 1979, Pub. L. 96-223, 94 Stat. 229, referred to by Respondents (Respondent's Brief, page 8, note 7) makes it abundantly clear that Congress had no intention of validating Indian severance taxes by such indirect means. The original Senate version accorded tribal severance taxes the same recognition as state severance taxes. Once again the Conference Committee refused to acknowledge the validity of tribal taxes of non-Indian mineral lessees and denied a deduction for any such tribal taxes, stating:

> "The Senate amendment also provided that severance taxes properly imposed by Federally recognized Indian tribes are treated in the same manner as State severance taxes.
>
> "*Conference agreement.* The conference agreement follows the Senate amendment except that a severance tax may not be taken into account to the extent the total rate of severance tax imposed by a State exceeds 15 percent, and no deduction is allowed for Indian severance taxes." (Conference Report on H.R. 3919, 96th Cong. 2d Sess., Rept. 96-817, page 104).

Respondents also create an issue out of tribal resources management, stating "Petitioners equate tribal resources to publicly owned property and conclude from this erroneous premise that the development philosophy of the tribe is subject to scrutiny or even frustration by the states and the producers." (Respondent's Brief, page 9). While we did not raise this point, Petitioners do believe that it is the federal government, not the individual tribes, which is responsible for the overall supervision and coordination of energy production on all public land, including Indian reservations. *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D. Alas. 1973).

Legal officers of the Executive Branch have long recognized that federal law and the necessary implications of federal sovereignty divest Indian tribes of their power to tax non-Indians operating on Indian reservations under express federal authority.

The Department of the Interior Solicitor's Opinion of June 3, 1941 is directly in point. In that Opinion, the Solicitor held that when the Federal Power Commission had granted a license for power lines across an Indian Reservation, the tribe has absolutely no power to tax the power company with respect to those lines. A more direct precedent concerning the divesture of tribal taxation powers is difficult to imagine.

The Solicitor's Opinion and subsequent Opinions of the Attorney General cited by this Court in *State of Washington* v. *Confederated Tribes of the Colville Reservation*, ... U.S. ..., 48 U.S.L.W. 4668 (1980), such as 7 Op. Atty. Gen. 174 (1855), merely follow the initial Opinion of the Attorney General on this subject. In *Right of the Cherokee to Impose Taxes on Traders*, 1 Op. Atty. Gen. 645 (1824), Attorney General Wirt concluded an Indian Tribe could not tax traders approved by the federal government.

CONCLUSION

In conclusion, neither the legislative, executive or judicial branch has recognized the power of Indian tribes to tax non-Indians operating on reservations under express federal authority, especially in an area as critical to the national interest as energy production.

Dated: September 17, 1980.

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the States of New Mexico, North Dakota and Utah in support of the Petitions for Certiorari pending in this Court in the above-referenced causes. These cases involve issues of vital

importance to the Amici States which we urge the Court to review.

The States of New Mexico, North Dakota and Utah include large areas of land set aside for Indian reservations which contain substantial reserves of oil and gas, coal and other natural resources. Extraction of these resources by non-Indian producers has been taxed by Amici States for nearly half a century since such taxation was first authorized by Congress in the Act of March 3, 1927, 25 U.S.C. §§ 398(a)-(e).

SUMMARY OF ARGUMENT

The decision of the Tenth Circuit, if allowed to stand, will undermine the congressional scheme embodied in 25 U.S.C. §§ 398(a)-(e) and create grave consequences for the taxing schemes of Amici States as well as for the consumers of natural resources.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit involved in these cases threatens to frustrate the tax scheme of Amici States with respect to the severance of these natural resources by completely undermining the congressional policy expressed in the Act of March 3, 1927, 25 U.S.C. §§ 398(a)-(e), to divide the benefits of oil and gas severance on Executive Order Indian reservations between the States and the Tribes by allocating to the States the power to tax the entire output of oil and gas production on such lands while granting to the Tribes the rental, royalty and bonus incomes from this production.

This judicial undoing of a decades-old congressional policy poses potentially disastrous consequences for the Amici States. Indeed, it is in accordance with the benefit allocation scheme expressed in 25 U.S.C. §§ 398(a)-(e)

that these States have adopted a tax policy which seeks to derive maximum revenue consistent with maintaining maximum oil and gas production from all producing leases including marginal wells. By permitting the additional burden of Indian taxation on the severance of these resources contrary to 25 U.S.C. §§ 398(a)(-(e), the decision of the Tenth Circuit will occasion a reduction in oil and gas production from marginal wells, discourage exploration in all but proven areas, and inevitably reduce the amount of production against which state tax rates may be applied. It will also impede the ability of the Amici States to increase the severance taxes which the Congress has given them the statutory right to impose without restriction. The potentially disastrous revenue consequences for the Amici States resulting from this decision are thus apparent. In this connection it should be remembered that while state tax policy is set by legislatures which include representatives elected wholly or in part by reservation Indians, Indian tax policy is established by tribal councils elected only by tribal members to the exclusion of other citizens of the Amici States. Under these circumstances, it is highly doubtful that Indian tax policy with reference to oil and gas severance will be coordinated with state tax objectives.

Moreover, while the decision of the Tenth Circuit diminishes the benefits allocated to the States by this federal statutory scheme, it leaves the other side of the benefit allocation ledger unchanged. The Tribes remain free to collect the rental, royalty and bonus incomes from oil and gas production without interference and without sharing. This imbalance cannot reasonably be said to be consistent with the congressional intent in enacting 25 U.S.C. §§ 398(a)-(e).

Finally, the impairment of state tax policy by the decision of the Tenth Circuit threatens to impose unwel-

come consequences on the citizens of the Amici States as well. For example, it will disrupt the use of severance tax funds for the construction of permanent public facilities and other public improvements which are available to all the citizens of the State of New Mexico. Secondly, since 20% of oil and gas production from the Jicarilla Reservation is utilized intrastate, an increase in the cost of production by virtue of an Indian severance tax will result in an increase in the cost of energy to New Mexico consumers. These increases would be made without the protection of public debate or regulatory review. Similar consequences will undoubtedly be visited upon the citizens in the other Amici States as other Tribes take advantage of the ruling.

CONCLUSION

For the foregoing reasons—coupled with the reasons set forth by Petitioners—Amici States respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

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BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. Does the authority of an Indian Tribe to tax non-members, when on Indian land within a reservation, derive solely from the tribal power to exclude those non-members from that land, and the concomitant power to establish conditions for their entry upon such land?

II. If the answer to Question I is in the affirmative, may an Indian Tribe exercise that power to exclude a non-member from Indian land within a reservation for failure to pay a tribal tax, under the following circumstances:

(1) The non-member has entered upon the Indian land and undertaken commercial activities there pursuant to a lease agreement with the Tribe which has been authorized by a federal statute and approved by the Secretary of Interior in accordance with that statute;

(2) The lease agreement does not include payment of the Tribal tax as a condition of remaining in possession and continuing the commercial activities authorized by the lease agreement; and

(3) The non-member is in full compliance with all terms and conditions of the lease agreement?

INTEREST OF THE STATE OF WASHINGTON

The interest of the State of Washington does not stem from any desire to deprive Indian Tribes of tax revenues, be those revenues from oil and gas production or from any other commercial activity taking place on Indian lands. Nor is our interest the preservation of our own tax base, as it was in *Washington v. Confederated Tribes of the Colville Reservation*, ... U.S. ..... (June 10, 1980, No. 78-630). This Court's decision in *Colville* has removed our concern in that regard, by rejecting the proposition a state's taxing power can be preempted by tribal taxing power; and thus we need not challenge a Tribe's taxing power to preserve the State's.

Indeed, we do not view this case as primarily a tax case at all. Yet the issues that concern us arise from a portion of this Court's opinion in *Colville*, *i.e.*, its discussion of tribal taxing power over non-Indians. (Slip. Op. 15-17.) Though the holding is entirely clear—the Colville Tribe's cigarette tax on

non-Indian purchasers is valid—the grounds for the holding are less clear. The Court's discussion appears to base this taxing power upon the tribal power to condition entry upon Indian lands, and to exclude non-members for failure to comply with those conditions. The discussion expressly applies this taxing power to non-members, and to transactions involving non-members, only when located on *Indian* lands; further the discussion relies upon lower court decisions and opinions of the U.S. Attorney General which are themselves based upon the tribal right to condition entry upon Indian lands. The Court, in short, appears to have answered the first of our two "Questions Presented" in the affirmative. And that is certainly the correct answer.

The Court's citation of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978) casts, however, a shade of doubt upon that answer—a doubt which the various Indian tribes will surely be quick to exploit. One can fully expect the tribes to argue, in this case or in subsequent cases, that tribal taxing power over non-Indians is part of their retained inherent sovereignty affirmed in *Wheeler*, and is unaffected by this Court's decision in *Oliphant*.

If this argument is accepted, non-members would be subject to the general regulatory power of a tribal government in which they cannot participate. And the State of Washington's interest in protecting its citizens from such power is obvious. For what is at stake is not just taxing power over non-members, but a broad range of regulatory power, including land-use controls over non-Indian lands located within a reservation boundary, control over non-Indian fish-

ing and hunting on such lands,[1] and a whole host of other types of regulations. *Cf., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) for a discussion of the constitutional problems presented by any such system of government in which the persons governed cannot participate.

Hence our interest in having this Court make it absolutely clear in this case that the tribal power to tax non-members, or to regulate their conduct rests solely upon the tribal power to exclude those non-members from Indian lands, and the concomitant power to impose conditions upon entry.

Once that is done, however, an additional concern remains; this involves the second of the "Questions Presented". The State and some of its counties have possessory interests in many parcels of Indian land. Some of these possessory interests are easements for public roads; others are leasehold interests in Indian lands used by the State for public parks.

If a Tribe can impose upon the holder of such possessory interests a condition not included or provided for in the written instrument, and then exclude the holder from Indian lands for failure to comply with that condition, the possessory interest can become a nullity. The new condition might be a tax or a fee; or it might be something entirely non-monetary, such as a restriction on hours of use, or a speed limit different from state or local speed limits.

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[1]This question of tribal control over non-Indian hunting and fishing on non-Indian lands is, of course, now before this Court in *Montana v. United States* (cert. granted April 13, 1980), No. 79-1128. In our amicus brief filed in that case, at pp. 14-29, we discuss extensively the issues involved in the first of the two "Questions Presented" here, i.e., the precise source of Tribal power over non-Indians; for those issues are involved in *Montana* as well. We would refer the Court to our discussion there rather than attempt to repeat it here. Accordingly, the principal focus here is on the second of the two "Questions Presented," rather than the first. Though *Montana* may well dispose of the first, it will not dispose of the second.

If the instrument itself imposes that condition, or allows the Tribe to impose it, as it might choose, there is no cause for complaint, of course. But if the terms of the instrument can in effect be changed, then the possessory interest can be made a practical nullity by the unilateral decision of the Tribe. The power of the Tribe to make changes of this sort, and to expel non-members for failure to comply with them, is the basic issue here. If the Jacarilla Apache Tribe can expel the Petitioners in this case from its lands, for failure to pay a tax not authorized by the oil and gas leases into which they have entered, the easements and leaseholds held by the State of Washington for the benefit of the general public will obviously be of dubious value.

REASONS FOR GRANTING THE WRIT

The Jacarilla Apache Tribe of Indians resides on an Executive Order Reservation, located within the State of New Mexico. The Petitioners are engaged in the production of oil and gas from Tribal lands under oil and gas leases issued with the approval of the Tribal Council and the Secretary of the Interior, pursuant to 25 U.S.C. §§ 398a and 398.

On July 9, 1976, the Tribal Council adopted its Oil and Gas Severance Tax. (Pet. Cert. App. I, pp. 120-125). As we understand the record, most, if not all, of the oil and gas leases were issued before the adoption of the tribal tax, and none of the leases contain a requirement that any such tax must be paid. At issue is the validity of that tax, under these circumstances.

As already stated, we do not dispute the general power of a Tribe to impose conditions upon the entry of non-members on Indian lands located within a res-

ervation, and to exclude non-members for failure to comply with those conditions. Further, those Indian lands may include not just tribally owned lands, but lands owned by individual tribal members. Nor, as already pointed out, do we dispute the proposition that these conditions imposed by the Tribe may include payment of fees or taxes.

But what is the effect upon that tribal power to impose such conditions, and to exclude for non-compliance with those conditions, when the non-member holds a lease issued pursuant to a statute such as 25 U.S.C. § 398a? That section provides:

> "Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (Forty-third Statutes, page 244) [25 USC § 398]."

And section 398, in turn, provides in pertinent part:

> "Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage reservation subject to lease for mining purposes for a period of ten years under section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795) [25 USC § 397] may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: * * *"

When Congress used the term "lease" in statutes such as these, it intended, we submit, to authorize leases as understood by lawyer and layman alike: i.e., agreements under which the lessee is entitled to remain in possession *so long as the lessee complies with the terms and conditions contained in that agreement.* If an Indian Tribe can impose upon the lessee conditions not provided for in the lease, and eject the lessee for failure to comply with those conditions, then the lease is not, we submit, really a lease at all. It is a sham lease.

The basic issues in this case can be put quite bluntly: Did Congress intend that leases authorized by 25 U.S.C. §§ 398 and 398a be sham leases? Or did Congress intend that they be real leases, which confer a continuing right of possession so long as the terms and conditions in the lease are met?

The great importance of this question can be seen by an examination of the many statutes which under terms and conditions approved by the Secretary of Interior authorize the leasing of Indian lands. See, 25 U.S.C. §§ 380, 395, 396, 397, 398, 398a, 399, 400, 400a, 401, 402, 402a, 403, 403a, 403b. In addition to these statutes are those authorizing the granting various sorts of easements or rights of way, such as 25 U.S.C. §§ 321 and 323. The effect of these statutes is here involved as well. As an examination of these statutes will show, easements and leases can be issued for many purposes other than oil and gas production; those purposes can range from coal mining, to cattle grazing, to provision of ordinary residences. Existing easements and leases issued pursuant to these statutes must certainly be numbered in the thousands, nation-wide.

The protection which these leases and easements, and the statutes which authorize them, afford to the holder is the critical issue in this case, as we view it. And that issue is of sufficient importance to merit full review by this Court.

Respectfully submitted,

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August, 1980

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QUESTIONS PRESENTED

1. Whether the Constitution of the United States authorizes Indian tribes to exercise governmental powers of taxation over non-Indians operating on the reservation under the authority of the federal government.

2. Whether attribution of inherent tribal sovereignty to the Jicarilla Apache tribe is consistent with their tribal dependent status and supported by the trial record.

3. Whether the Jicarilla Apache tribe may levy a tax on those previously granted access to the reservation under tribal leases approved by the Secretary of the Interior.

4. If Indian tribes have the power to tax oil and gas produced under leases approved by the Secretary of the Interior, whether that power is preempted on the Executive Order Jicarilla Apache Reservation by 25 U.S.C. § 398c and the total federal regulatory scheme.

5. If Indian tribes have governmental authority to impose taxes on non-Indians, whether constitutional protections apply to prevent the abuse of tribal authority.

6. Whether taxation of production of oil and gas by both the States and Indian tribes unduly burdens interstate commerce.

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No. 80-11

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION and BAYLESS, JEROME T. McHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC. J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, (NOW CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, and OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

BRIEF OF THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals, reported at 617 F.2d 537 (1980), appears in the Joint Appendix at 139. The Findings of Fact and Conclusions of Law and Judgment of the District Court for the District of New Mexico appear in the Joint Appendix at 127, 135. (hereafter J.A.).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on Feburary 22, 1980. The decision was modified and rehearing denied by the Court of Appeals on April 25, 1980. (J.A. 199). This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves the Constitution of the United States, particularly Articles I-VII and the Fifth, Tenth, and Fourteenth Amendments thereto.[1]

The case also involves the Indian Reorganization Act, 48 Stat. 984, *et seq.,* 25 U.S.C. § 461, *et seq.;* and Act of March 3, 1871, 16 Stat. 566, 25 U.S.C., § 71; the Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922; Executive Orders Relating to the Jicarilla Apache Reservation;[2] and the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398c (quoted in full herein n.39, p. 29, *infra).*

STATEMENT OF THE CASE

The Jicarilla Apache tribe of Indians resides on an Executive Order Reservation lying within the area of New Mexico ceded to the United States by Mexico under the Treaty of Guadalupe Hidalgo. That treaty reserved no sovereign powers to any

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[1] Appendices to Petition for Certiorari (hereafter A.P.C.), at 78-83.

[2] *Id.,* at 84-119

Indian tribe but placed such tribes under the exclusive control of the government of the United States. The Jicarilla Apache tribe is organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*

Petitioners are engaged in the production of oil and gas from tribal lands under valid oil and gas leases issued with the approval of the Tribal Council and the United States Secretary of the Interior. Rentals, royalties, and bonuses are paid to the United States Government, for the benefit of the tribe. The vast majority of these leases were issued prior to the Jicarilla Apache's adoption of their revised constitution in 1968, which first claimed tribal power of taxation over non-Indians. Approximately 80% of the production is shipped interstate for sale outside the State of New Mexico. (J.A. 129).

On July 9, 1976, the Jicarilla Apache Tribal Council adopted an ordinance which purported to levy a severance tax on the production of oil and natural gas "sold or transported off the reservation." (J.A. 38-39).

Petitioners filed suit in the United States District Court for the District of New Mexico under 28 U.S.C. § 1331 alleging that the Jicarilla Apache Tribe lacked authority to tax non-Indians lawfully on their Reservation under federal authority. Petitioners further alleged that if the Court should find the Tribe had any governmental authority to tax non-Indians then the Jicarilla tax violated the Commerce Clause and the Fifth Amendment of the United States Constitution. Finally, Petitioners alleged that if the Tribe had the inherent sovereignty to levy a tax on non-Indians producing oil and gas on the Executive Order Jicarilla Reservation, then that authority was preempted by 25 U.S.C. § 398c.

The District Court entered its Findings of Fact and Conclusions of Law, and Judgment in favor of Petitioners. (J.A. 127, 135). It held that "Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a

severance tax upon oil and gas produced on the Jicarilla Reservation." (*Id.*, 132). After reviewing the legislative history of 25 U.S.C. § 398c, the District Court further found that Congress intended to allow the states and local authorities the exclusive right to tax oil and gas produced on Executive Order Indian reservations. The court also held, that if valid, the Jicarilla severance tax would discriminate against, and, combined with the New Mexico severance taxes, constitute a multiple burden upon, interstate commerce. (*Ibid.*).

A divided Court of Appeals for the Tenth Circuit reversed, holding that even though no treaty or Act of Congress authorizes taxation of non-Indians, the Jicarilla tribe had such power as an attribute of its retained sovereignty. (J.A. 150). It therefore directed entry of judgment in favor of the tribe without considering the sources or attributes of the inherent sovereignty originally held or presently retained by the Jicarilla Apache Tribe or remanding the case for presentation of evidence on this issue. The court found that while the Commerce Clause of the United States Constitution may express the national interest and thereby limit the power of Indian tribes, the Jicarilla severance tax is not in violation thereof. *(Id., 156).* The Court of Appeals did not otherwise address the protection afforded to non-Indians doing business on Indian reservations by the United States Constitution. Finally, the majority held that 25 U.S.C. § 398c was not preemptive of the Jicarilla tax even though it granted the states the express authority to tax oil and gas produced on Executive Order reservations.

Apparently in light of Petitioners' motion for rehearing which pointed out that the Administrative Procedure Act had been amended with regard to sovereign immunity, the court below modified its opinion to hold that since the tribe had the inherent power to tax, any claims that the Secretary of the Interior violated federal law in approving the tax were irrelevant.

SUMMARY OF ARGUMENT

This case presents legal issues of first impression, having far ranging social, political, and economic consequences for both Indians and non-Indians. The question of whether an Indian tribe can tax non-Indians producing oil and gas under leases approved by the Secretary of the Interior has not been decided by this Court. Since Indian reservations contain a significant portion of this country's future energy reserves,[3] it is important for this Court to determine whether the development of this energy "significantly involves the tribes" or is rather a problem national in scope.[4]

The United States Constitution does not recognize any independent governmental authority in Indian tribes.[5] If Indian tribes nonetheless have the inherent power to tax all energy sources on Indian reservations without coordination with, or limitation by, the state or federal governments, it would be inconsistent with their dependent status.[6] The tribal leases herein were executed pursuant to detailed federal regulations as to the remuneration to which the tribe was entitled, at a time when no Indian tribe had ever collected a severance tax.

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[3] As long ago as 1974, Indian oil and gas leases covered a collective acreage of 4,187,644 and produced 30,685,000 barrels of oil and 125,080,000 mcf of gas annually. It is estimated that coal under Indian reservations could provide more than 50 billion tons, or 10% of the nation's future needs, and that uranium reserves located on Indian reservations constitute about two-thirds of all uranium reserves on federal land. In 1974, Indian-held resources accounted for over 15% of the total of all mining on Federal and Indian lands. *Bureau of Competition, Report to the Federal Trade Commission on Mineral Leasing on Indian Lands,* 11, 17, 47 (October 1975).

[4] *Washington* v. *Confederated Tribes of the Colville Reservation,* ..... U.S. ...., 65 L.Ed.2d 10, 28, 100 S.Ct. 2069, 2081 (1980).

[5] *United States* v. *Wheeler,* 435 U.S. 313 (1978); *United States* v. *Kagama,* 118 U.S. 375 (1886).

[6] *Right of the Cherokees to Impose Taxes on Traders,* 1 Op. Atty. Gen. 645 (1824); *Memorandum of the Solicitor to the Commissioner of Indian Affairs,* (June 3, 1941)

Neither the federal regulations or the leases themselves provide any basis to suggest tribal power to levy taxes after Petitioners' entry onto the reservation. The exclusive federal authority is emphasized by the fact Petitioners are operating on the Jicarilla reservation under the daily supervision of the United States Geolological Survey and Bureau of Indian Affairs.[7] The effort of the tribe to tax conflicts with this federal authority and Congressional intent to prohibit further tribal burdens on these leases as manifest by the language and history of 25 U.S.C. § 398c.

While this Court has dealt with the concept of Indian tribal sovereignty many times, there still exist fundamental unresolved questions of Constitutional law as to the limits which must be placed on the previously enunciated doctrine of tribal sovereignty as it relates to non-Indians operating on reservations under federal licenses. Indian tribes have historically been regarded as unconstrained by Constitutional limitations designed to protect all citizens from the potential abuses of governmental authority.[8] United States citizens cannot, however, be subjected to coercive power by extra-Constitutional tribal governments within the territorial limits of the United States. The restrictions imposed by the Constitution, as well as those flowing from tribal dependent status, are especially significant issues herein as they relate to the criminal sanctions necessary to enforce tribal taxes against non-Indians.[9]

To allow 287[10] independent Indian enclaves within the borders of the existing states to assert sovereignty over non-

[7] 25 C.F.R. Part 171; 30 C.F.R. Part 221; *White Mountain Apache Tribe* v. *Bracker*, ... U.S. ...., 65 L.Ed.2d 665, 100 S.Ct. 2578, (1980).

[8] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978);

[9] *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976).

[10] *Santa Clara, supra*, 436 U.S. 65, n. 21.

Indians would also seriously undermine state jurisdiction and subject the entire federal structure to unnecessary stress.[11] Moreover, tribal governmental power which is completely autonomous within the geographical limits of the reservations would subject non-Indians to potentially coercive governmental authority in a milieu of alien customs, values, and traditions.

ARGUMENT

POINT I

A

THE UNITED STATES CONSTITUTION DOES NOT RECOGNIZE ANY INDEPENDENT GOVERNMENTAL AUTHORITY FOR INDIAN TRIBES

The Court of Appeals below held that the Jicarilla Apache tribe had governmental authority to tax non-Indians without benefit of any treaty or statutory authority. (J.A. 150-51). This holding is grounded on that court's interpretation of the confused and often contradictory concept of "inherent sovereignty." It is necessary at the outset to examine the origin, nature, and extent of the "sovereignty" of the Jicarilla Apache tribe, since "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are upon the soundest principles, exempt from taxation." *Curry* v. *McCanless,* 307 U.S. 357, 366 (1939). Inasmuch as the character of all governmental powers of sovereignty in this country is structured and limited by the United States Constitution, *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386, 388 (1789), it would appear appropriate to examine this venerable

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[11] If tribes are allowed independent governmental jurisdiction, they are free to ignore totally all state police power restrictions in areas such as liquor and gambling. *See, e.g., United States* v. *New Mexico,* 590 F.2d 323 (10th Cir. 1978), cert. den. 444 U.S. 832 (1979), prohibiting enforcement of state liquor laws on an Indian reservation; *Seminole Tribe* v. *Butterworth,* 491 F.Supp. 1015 (S.D.Fla. 1980), prohibiting enforcement of state gambling restrictions on Indian reservations.

document to determine what governmental authority is contemplated for Indian tribes.

"Indian tribes" are mentioned only once in the United States Constitution. Article I, § 8, Clause 3 provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."[12] The Court below stretched this limited reference to Congressional power over Indian tribes in the Commerce Clause into a recognition of tribal governmental sovereignty. The majority implicitly, and Judge McKay's concurrence explicitly, assumed that by mentioning "Indian tribes" in the Commerce Clause of the Constitution, the founding fathers intended the tribes to assume general governmental authority within the territorial boundaries of their reservations. (J.A. 162).

This Court, however, long ago rejected any such interpretation of the Constitution. In *United States* v. *Kagama,* 118 U.S. 375 (1886), it concluded there is no legitimate governmental sovereignty for Indian tribes within the federal framework. In a passage recently quoted with approval in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 211 (1978), this Court said:

> Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States or of the States of the Union. *There exist in the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these. *United States* v. *Kagama,* 118 U.S. 375, 379 (1886). (emphasis in original).

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[12] "Indians not taxed" are recognized in two less relevant provisions relating to the determination of state representation in the House of Representatives and state apportionment of direct taxes. United States Constitution, Article I, § 2, Clause 3 and the Fourteenth Amendment, § 2.

Indeed, this Court recognized the difficulties of integrating tribal sovereignty into the dual Federal-State system created by the Constitution very recently in *White Mountain Apache Tribe* v. *Bracker,* ... U.S. ..., 65 L.Ed.2d 665, 100 S.Ct. 2578 (1980). Again recognizing the continuing validity of *Kagama*, Justice Marshall said at 65 L.Ed.2d. 672, 100 S. Ct. 2583:

> The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973), quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886).

Any recognition of general governmental authority in Indian tribes directly contradicts the Tenth Amendment which expressly reserves to the states or the people all sovereign governmental power not directly delegated to the federal government. *New York* v. *Dibble*, 62 U.S. (21 How.) 366, 368-70 (1859); *cf., National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Since all constitutionally mandated governmental power is divided among the United States, the States, and the people, recognition of Indian tribes as possessing inherent governmental authority not derived from one of these sources clearly violates the Constitution.

Rather than contemplating a role for Indian tribes as governmental sovereigns, then, it is clear the Constitution does not recognize Indian tribes as governmental entities within the federal system.[13] To read a recognition of general governmental

[13] Several legal commentators have examined the relationship between "tribal sovereignty" and the United States Constitution extensively and reached this conclusion. *See, e.g.,* Martone, *American Indian*

authority for Indian tribes into the Constitution, as the Court of Appeals did, is not justified by that document's language or historical context.[14] It also directly contravenes the entire system of divided federal-state authority established therein.[15]

The Constitution's denial of a governmental role for Indian tribes within the federal system is particularly significant in the present context. The Constitution, and especially the Tenth Amendment, has long played a vital role in mediating the respective powers of the state and federal governments in the area of taxation. It establishes a system where neither federal nor state government has the power to cripple or destroy the other through taxation.[16] In the instant case, however, the tribal severance taxes will inevitably restrict the ability of New Mexico and other states to obtain tax revenue from oil and gas produced on the mineral-rich Indian reservations within their boundaries. Under the Court of Appeals' decision, the states are expected to perform certain governmental duties on the reservation[17] but the tribes become sovereign over not only their own

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Tribal Self-Government in the Federal System: Inherent Right or Constitutional License, 51 Notre Dame Lawyer 600 (1976); Mettler, *A Unified Theory of Indian Tribal Sovereignty,* 30 Hastings L.J. 89 (1978); Note, *Sovereignty, Citizenship and the Indian,* 15 Ariz.L.R. 973 (1973).

[14] A review of contemporaneous historical documents indicates the draftsmen of the Constitution never contemplated a governmental authority for Indian tribes. *The Federalist* No. 7 at 37, No. 24 at 156-7, No. 25 at 161, No. 42 at 282 (Wesleyan U. Ed. 1961). The general tenor of these comments is that Indian tribes were potentially dangerous aliens to be isolated from American society. Such territorial isolation is no longer possible since all the present Indian reservations are now within the boundaries of the States of the Union.

[15] Article I, §1; Article II, §1; Article III, §1; Article IV; Article V; Article VI; Article VII.

[16] *Lane County* v. *Oregon,* 74 U.S. (7Wall.) 71, 76-7 (1869); *In re Kentucky Fuel Gas Corporation,* 127 F.2d 657 (6th Cir. 1942) appeal dism'd, 317 U.S. 593 (1943).

[17] There is no dispute the Jicarilla Tribe has availed itself of state highways, police, game, and agricultural services and other state

people but all non-Indians within their borders, and in a broader sense, over the States.

The Constitution grants to the Congress the primary authority to regulate commerce with the Indian tribes so that the states would not inadvertently infringe on tribal customs and create unnecessary hostilities between Indian and non-Indian cultures.[18] To allow extra-constitutional tribal taxation of mineral resources, already heavily taxed by the states, would create the very tribal-state hostility the Constitution was designed to prevent.[19]

Dissenting from the majority below, Chief Judge Seth noted that the United States and the states are the only two governmental entities contemplated by the Constitution. To allow Indian tribes sovereignty within the territorial boundaries of a state, but not subject to state control, is inconsistent with the federal concept:

> The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities, and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. (J.A. 169) (emphasis in original).

To grant Indian tribes the sovereignty over non-Indians urged by the majority of the Court of Appeals would be to elevate them to a level equal to or greater than States of the Union. In his concurring opinion, Judge McKay, equating

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functions. (R. 263-67; 272-4; Defs. Ex. T-1, Ex. T-2, R. 289-90). Indeed, the Congress has authorized the states to provide many governmental services on the reservations. *See, e.g.*, 25 U.S.C. §§ 231, 311, 452.

[18] The Federalist No. 3 at 16-17 (Wesleyan U. Ed. 1961).

[19] Compare *United States* v. *Blackfeet Tribe of Blackfeet Ind. Res.*, 369 F.Supp. 562 (D.Mont. 1973) with *Seminole Tribe* v. *Butterworth*, 491 F.Supp. 1015 (S.D. Fla. 1980).

tribes with federal municipalities, expressly recognized the implications of the majority position in attributing "police powers, regulatory powers, or fiscal powers" to Indian tribes. (J.A. 164). The states would have absolutely no control over the exercise of governmental authority on those Indian enclaves existing within their borders.

The policy purposes underlying the doctrine of "tribal sovereignty," including *inter alia* the preservation and development of tribal customs and religion, may be fully achieved without subjecting other Americans to tribal jurisdiction. Our federal system was not designed to, and cannot, accommodate governmental authority by an entity not recognized by the Constitution.

POINT I
B
IMPOSITION OF THE JICARILLA TAX UPON NON-INDIANS OPERATING ON THE RESERVATION UNDER FEDERAL AUTHORITY IS INCONSISTENT WITH TRIBAL DEPENDENT STATUS

Since Indian tribes cannot be recognized as having governmental powers outside of, and in conflict with, the system of dual sovereignty created by the Constitution, it is important to determine the nature of sovereignty possessed by them. In *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), Chief Justice Marshall first used the phrase "domestic dependent nations" which has frequently been employed since to characterize the role of Indian tribes within the governmental structure of the United States. In defining a "domestic dependent nation", Chief Justice Marshall specifically recognized tribal government was totally dependent upon the federal government. 30 U.S. (5 Pet.) at 17.

In his concurring opinion in *Cherokee Nation*, Justice Johnson also made it clear that he did not perceive the Court's decision as recognizing "Indian sovereignty" to allow general governmental authority over non-Indians.[20] Justice Johnson then noted that even if they were to be given limited powers of self-government over internal tribal matters, Indian tribes could not be recognized as general governmental entities. 30 U.S. (5 Pet.) at 26.

Justice Baldwin in his concurrence in *Cherokee Nation*, noted that even at that early date it had long been settled that Indian tribes retained no independent inherent sovereignty but were vested with only such rights as were recognized by the federal government:

> In the case of *Johnson* v. *M'Intosh,* 8 Wheaton 543, 571, the nature of the Indian title to land on this continent, throughout its whole extent, was most ably and elaborately considered; leading to conclusions satisfactory to every jurist, clearly establishing that from the time of discovery under the royal government, the colonies, the States, the confederacy and this Union, their tenure was the same occupancy, *their rights occupancy and nothing more; that the ultimate absolute fee, jurisdiction and sovereignty was in the government,* subject only to such rights; that grants vested soil and dominion and the powers of government, whether the land granted was vacant or occupied by Indians . . . *They are not named or referred to in any part of the opinion of the court as nations or States, and nowhere declared to have any national capacity or attributes of sovereignty in their relations to*

[20] Justice Johnson pointed out that such tribal governmental sovereignty would be completely inconsistent with existing state, as well as federal, powers:

> It is clear that it was intended to give them [Indian tribes] no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted, or, perhaps, permitted, consistently with *the unquestioned rights of the states or United States, over the territory within their limits.* 30 U.S. (5 Pet.) at 23. (emphasis added).

> *the general or State governments.* 30 U.S. (5 Pet.) at 48-49. (emphasis added).

Justice Baldwin further recognized that since the Indians had no "inherent" rights of sovereignty, the courts could not create such rights merely by judicial fiat:

> [T]he judicial power cannot devest the States of rights of sovereignty and transfer them to the Indians by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for over fifty-five years; and force, by mere judicial power, upon the other departments of this government and the States of this Union, the recognition of the existence of nations and states, within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. 30 U.S. (5 Pet.) at 49-50.

Subsequent to *Cherokee Nation,* this Court consistently continued to recognize the limitations inherent in tribal "sovereignty." In *United States* v. *Kagama,* 118 U.S. 375 (1886), for example, this Court recognized that in 1871 Congress withdrew any legal foundation for further attribution of governmental sovereignty to Indian tribes. In that year, Congress had passed a statute prohibiting acknowledgement or recognition of any Indian tribe as an independent nation or power capable of contracting with the United States by treaty.[21] In interpreting this Act, the Court recognized that Indian tribes no longer had sovereignty in the sense of independent governmental power, but were completely "dependent for their political rights" on the government of the United States. 118 U.S. at 384.

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[21] This statute, the Act of March 3, 1871, c. 120 § 3, 16 Stat. 570 is presently codified as 25 U.S.C. § 71.

In *Choctaw Nation* v. *United States,* 119 U.S. 1 (1886), the Court again emphasized that Indian tribes did not possess governmental authority. The Court therein compared Indian tribes to the federal and state governments in the following fashion:

> The United States is a sovereign nation, not suable in any court except by its own consent, and upon such terms and conditions as may accompany that consent, and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. *On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe.* 119 U.S. at 27 (emphasis added).

This Court's more recent decisions have likewise recognized that Indian tribes are proscribed from exercising those governmental powers terminated by Congress, as well as those inconsistent with their dependent status.[22] *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), clearly enunciated and applied the limitations implicit in tribal dependent status. In reversing a Ninth Circuit decision upholding tribal criminal jurisdiction over non-Indians, this Court pointed out that it could not find any legal source for such tribal jurisdiction. In reaching this conclusion, Mr. Justice Rehnquist, writing for the majority, considered various Indian treaties, opinions of the United

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[22] The historical line of precedent illustrating this Court's recognition of the limitations inherent in tribal dependent status also includes *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *Johnson and Graham's Lessee* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543, 574 (1823); *United States* v. *Rogers,* 45 U.S. (4 How.) 567 (1846); *United States* v. *McBratney,* 104 U.S. (14 Ott), 621 (1881); *Ward* v. *Race Horse,* 163 U.S. 504 (1896); *Montoya* v. *United States,* 180 U.S. 261 (1901); *United States* v. *Quiver,* 241 U.S. 602 (1916); *People* v. *Martin,* 326 U.S. 496 (1946); *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962); *Kennerly* v. *District Court,* 400 U.S. 423 (1971). The divestiture of Indian tribal sovereignty in favor of the United States, under its Constitution and framework of Anglo-Saxon common law, accords with the views of the courts throughout the common law nations. *Cf., Milirrpum v. Nabalco Pty. Ltd. and Commonwealth of Australia,* [1972-1973] Argus L.R. 65, 122-176 (S. Ct. N. Terr. Australia 1971).

States Attorney General and the history of congressional action and inaction. In attempting to determine the historical understanding of the Congress, for example, Justice Rehnquist quoted from a 1960 Senate Report recommending enactment of a bill prohibiting unauthorized entry upon Indian land:

> Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. *This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.* 435 U.S. at 205. (emphasis in original).

More specifically the *Oliphant* holding recognized the limits on tribal power:

> . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers; *'inconsistent with their status.'* 435 U.S. at 208. (emphasis in original).

In *Oliphant,* then, this Court clearly rejected the assertion that Indian tribes may exercise all governmental powers except those expressly withdrawn by Congress, and held instead that Indian tribes were also without those powers inconsistent with their dependent status.

In *United States* v. *Wheeler,* 435 U.S. 313 (1978), the Court recognized that a divesture of tribal sovereignty occurs generally in tribal relations with non-Indian society:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. 435 U.S. at 326.

Justice Stewart then explained the difference between a tribe exercising potentially coercive jurisdiction over a non-Indian and possessing such jurisdiction over internal tribal relations:

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. *But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. 435 U.S. at 326. (emphasis added).

It is important, therefore, to examine whether the Jicarilla's attempt to tax non-Indians operating on the reservation under the authority of a lease, sanctioned and approved by the Secretary of the Interior, would be inconsistent with their dependent status. It is significant that in determining the extent to which a specific power is inconsistent with tribal dependent status this Court has considered the operating assumptions of the Executive and Legislative Branches, as well as those of the lower federal courts. *Oliphant, supra,* 435 U.S. at 203. Legal officers within the Executive Department have frequently pointed out sovereignty of Indian tribes is dependent upon and completely subordinate to that of the United States.[21]

The Attorney General and Solicitor of the Department of the Interior have specifically recognized that Indian tribes do not have the power to tax non-Indians operating on Indian reservations with federal permission. The first United States Attorney General to consider the problem advised that to allow Indian tribes to tax non-Indians rightfully engaged in commerce on the reservation under a federal license would be inconsistent with tribal dependent status. In *Right of the Cherokees to Impose Taxes on Traders,* 1 Op. Atty. Gen. 645 (1824), Attorney General Cushing noted the potential for abuse in allowing Indian tribes to

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[21] *See, e.g., Jurisdiction of Courts of the Choctaw Nation,* 7 Op. Atty. Gen. 174, 178 (1855); *Regulation of Traders on the Navajo Reservation,* 60 I.D. 176 (1948).

tax non-members as well as the conflict with Congressional authority inherent in taxation of federal licensees:

> Again: *if the Cherokee nation have the right to tax at all, the quantum of the tax rests in their own discretion.* If they have a right to impose a tax of $50, they have the same right to impose a tax of $500, $5,000, or $50,000: *If they may tax for revenue, they may tax for exclusion. If they have a right to superadd, at pleasure, a new burden on a regulation of trade ordained by Congress, they may impose such a burden as to defeat the regulation altogether.* In the case of McCullogh against the State of Maryland, the Supreme Court of the United States decided, that although the State of Maryland was a sovereign and independent State, and consequently possessed the general power of taxation, yet they had no right to tax an institution which the constitution had given Congress the power to create; *because a power to tax was a power to destroy, and was utterly inconsistent with the paramount power of Congress to create. The question which we are considering appears to me to turn on the same principle.* 1 Op. Atty. Gen. at 650 (emphasis added).[21]

More recently, the Solicitor of the United States Department of the Interior advised the Commissioner of Indian Affairs that when the Federal Power Commission has granted a license for the establishment of powerlines across an Indian reservation

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[21] In concluding tribal taxation would conflict with a preexisting federal license, the Attorney General considered how such tribal taxation power would contravene tribal dependent status:

> . . . *and what is a tax upon persons authorized by Congress to trade without it, but a new and distinct regulation superinduced upon the regulations provided by Congress:* So that the principle affirmed by this tax is, not that the trade shall stop, but that it shall continue; and that it shall continue subject to such regulations as the Cherokees may make, although by their treaties they declare that the sole and exclusive power of making such regulations shall be in Congress; or, in other words, that Congress alone shall regulate this trade, but that the Indians shall regulate it also: which appears to me to be a political solecism.
>
> *Upon the whole, I am of the opinion that the Indians have no right to impose this tax on traders licensed under the authority of the United States.* 1 Op. Atty. Gen. at 653. (emphasis added).

with express tribal authorization, the tribe has no power to tax the operation of those lines. *Memorandum of the Solicitor to the Commissioner of Indian Affairs* (June 3, 1941). The Solicitor concluded:

> While it is true, as stated in the proposed letter, that the Solicitor's opinion of October 25, 1934 (55 I.D. 14), defined the taxing power as "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe," that opinion also held that the powers vested in an Indian tribe under Section 16 of the Indian Reorganization Act were those powers of sovereignty not modified or abrogated by Congress. Congress has placed the control of power transmission lines crossing Indian reservations in the Federal Power Commission, subject only to the consent of an organized tribe to the disposition of the land and the amount of the annual charge. *When the tribe has consented, it has no power to control or interfere with the operation of the lines nor to impose additional burdens.* (Memorandum, p. 2) (emphasis added).

In the instant case, the Jicarillas have clearly consented to the leases involved and they therefore have "no power . . . to impose additional burdens." Petitioners who executed leases with the Jicarilla tribe on federal lease forms, with the express approval of the Secretary of the Interior, and totally subject to his supervision, are no less federal licensees than the power company referred to by the Solicitor.

The lower federal courts have also frequently recognized that Indian tribes do not have general governmental sovereignty and are allowed to control even their internal affairs only to the extent permitted by Congress.[25] Moreover, the wardship status

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[25] *United States* v. *Consolidated Wounded Knee Cases,* 389 F.Supp. 235 (D.Neb; D.S.D. 1975) aff'd in part and rev'd other grds. 538 F.2d 770 (8th Cir. 1976) *cert. den.,* 429 U.S. 1099 *reh. den.* 431 U.S. 909 (1977); *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indian Tribes,* Civil No. C-77-882 M (W.D. Wash. 1978); *Southern Pacific Transportation Co.* v. *Andrus,* Civil No. R-78-0216 BRT (D.Nev. 1980).

of Indian tribes is itself a recognition[26] that whatever governmental sovereignty is possessed by Indian tribes is inferior to, and may not conflict with or infringe upon, the national interests of the federal government. The Courts have also expressly recognized that Indian tribes may not impose additional burdens on businesses operating on the reservation under federal authority. *Musgokee National Telephone Co.* v. *Hall,* 118 F. 382 (8th Cir. 1902); *cf., City of Tulsa* v. *Southwestern Bell Telephone,* 5 F.Supp. 822 (N.D.Okla. 1934) *aff'd* 75 F2d 343 (10th Cir. 1935), *cert. den.* 295 U.S. 744 (1935). Tribal efforts to engage in business relations with non-Indians without federal supervision and approval have also consistently been invalidated.[27]

These lower court decisions are consistent with this Court's recognition that tribal action cannot lawfully interfere with vested property interests sanctioned by the federal government. In *Cherokee Nation* v. *Kansas Railway Co.,* 135 U.S. 641 (1890), the Court held that the Cherokee tribe did not retain the authority to prohibit access to their reservation to federal lessees. In that case, Congress had granted the Kansas Railway Company a right-of-way through the Cherokee Reservation. The Cherokees sought an injunction to prevent the Railway Company from entering the Reservation for the purpose of constructing a railroad. This Court resoundingly rejected the tribal contention that "all of such territory remains under the jurisdiction and sovereignty of the plaintiff" tribe (135 U.S. at 649). In holding the Cherokee tribe did not possess the power of eminent domain, the Court said:

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[26] With regard to the implications of wardship status upon tribal sovereignty, see, *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977); *Board of County Commissioners* v. *Seber,* 318 U.S. 705, *reh. den.* 319 U.S. 782 (1943); *Tiger* v. *Western Investment Co.,* 221 U.S. 286 (1911).

[27] *See, e.g., United States* v. *Candelaria,* 271 U.S. 432 (1926) (conveyance); *Laurence* v. *United States,* 381 F.2d 989 (9th Cir. 1967) (lease); *United States* v. *Emmons,* 351 F.2d 603 (9th Cir. 1965) (lease); *Leaf* v. *Udall,* 235 F.Supp. 366 (N.D.Cal. 1964) (contract for legal services).

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. 135 U.S. at 653.

Territory cannot, therefore, be the talisman of tribal sovereignty since such unidimensional analysis is ultimately inconsistent with the "domestic dependent" status of Indian tribes. A functional analysis of available authorities demonstrates retained tribal sovereignty, in the sense of creating affirmative governmental authority, exists only in a matrix of three distinct factors: territory, membership, and subject matter.[28] The coalescence of all three of these factors is necessary before tribal sovereignty can achieve its legitimate objective — the preservation of intra-tribal self-government — without infringing upon the superior sovereignty of the United States and its constituent states. No single factor in this matrix standing alone warrants the exercise of affirmative tribal jurisdiction. Just as the tribe may not exercise jurisdiction beyond the confines of the reservation or upon a subject matter precluded or pre-empted by Congress, so mere presence upon the reservation of non-Indians should not be sufficient to warrant the imposition of tribal governmental authority upon them.

The legitimate objectives of federal Indian policy, including the encouragement and protection of tribal "self-government," may be fully and effectively obtained without the indulgence of tribal territorial autonomy at the expense of the countervailing rights of other Americans. The policy purposes underlying the

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[28] Tribal sovereignty as an independent and affirmative source of power has properly been recognized as "pure legal fiction." Oliver, *The Legal Status of American Indian Tribes*, 38 Ore.L.R. 193, 230 (1959).

doctrine of "tribal sovereignty," directed toward the preservation and development of tribal customs, religions, traditions, and self-determination, may be fully achieved within the above matrix without sacrificing the legitimate interests of other Americans. Moreover, under this analysis affirmative application of tribal jurisdiction is distinguished from the defensive use of tribal "sovereignty," which may be employed to resist improper encroachment by the States.

Taxation of non-Indians by Indian tribes based on inherent sovereignty violates the federalism created by the United States Constitution and, as applied to tribal lessees under leases approved by the Secretary of the Interior, violates tribal dependent status.

POINT II

A

THE LEASES APPROVED BY THE SECRETARY OF THE INTERIOR DETERMINE THE TERMS ON WHICH PETITIONERS MAY REMAIN ON THE RESERVATION.

There can be little question the Jicarilla Apache tribe, with the express approval of the Secretary of the Interior, can determine who may enter the Reservation and on what terms. Linking the source of tribal authority to tax non-members to the proprietary power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing independent sovereign at the time the Constitution was signed.[29] When the United States acquired the New Mexico territory from Mexico under the 1848 Treaty of Guadalupe Hidalgo, there was no existing central Jicarilla tribal authority in the

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[29] As Chief Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression. (J.A. 167).

governmental sense. (J.A. 167) Article XI of the Treaty of Guadalupe Hidalgo recognized that the territory acquired by the United States was occupied in part by Indian tribes, "who will hereafter be under the exclusive control of the government of the United States." (A.P.C. 102).

The historical limitations on Jicarilla sovereignty, articulated so cogently in Judge Seth's dissent below, are consistent with this Court's construction of the effect of the Treaty of Guadalupe Hidalgo in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States,* 136 U.S. 1 (1890). In *Latter-Day Saints,* this Court found that from the moment it acquired lands from Mexico under the Treaty of Guadalupe Hidalgo, the United States was the only sovereign in the territory and all legitimate governmental power claimed thereafter must be directly traced to that source:

> Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. 136 U.S. at 42-3.

It is clear that the Court in *Latter-Day Saints* intended this rule to apply to tribal "governments" since only four years prior to the rule as enunciated in *Latter-Day Saints,* the Court had decided *United States* v. *Kagama,* 118 U.S. 375 (1886), discussed *supra,* at page 14; *cf., United States* v. *Blackfeet Tribe of Blackfeet Ind. Res.,* 369 F. Supp. 562 (D. Mont. 1973).

Petitioners submit the Court of Appeals below confused the proprietary right of an Indian tribe to condition entry onto the reservation, with the sovereignty of the United States government. This is obvious in the majority's reference to the power to exclude or condition entry, a right retained by every property owner, as a "sovereign power." (J.A. 150). In discussing the origins of tribal sovereignty, the Court of Appeals purported to

find a "commonly shared presumption of Congress, the Executive Branch, and the lower federal courts . . . . that the tribes retained the power to levy a tax that falls upon non-members doing business on the reservation."[30] As the earliest pronouncement of the Executive Branch cited by the Court of Appeals indicates, however, such tribal power derives directly from tribal property rights. In *Choctaw and Chicasaw Permit Laws,* 18 Op. Att'y Gen. 34 (1884), Attorney General Phillips made it clear Tribal "taxation" powers were proprietary in origin and applied "only to persons indifferent to the United States,"[31] not those legally on the reservation with federal authority.

The decisions of the "lower federal courts" relied upon by the Tenth Circuit also grounded tribal powers of taxation on the power to exclude non-members and to levy a fee as a condition precedent to their entry.[32] The "sovereignty" which allowed the Creek tribe to impose a legal permit "tax" on non-members was recognized as deriving from the Indian's power to limit entry onto their reservation in *Maxey* v. *Wright,* 54 S.W. 807

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[30](J.A. 149-50). The District Court found and concluded, based on the record, "Whatever sovereignty the Jicarilla Apache tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation. (J.A. 132). The Court of Appeals erroneously substituted its own findings and conclusions regarding inherent sovereignty without, at the least, remanding to the trial court for evidence on the attribution to the Jicarilla tribe of sovereignty to impose taxation.

[31] 18 Op. Atty. Gen. 34, 37.

[32](J.A. 150). See, *Buster* v. *Wright,* 135 Fed. 947, 949 (8th Cir. 1905), appeal dism'd, 203 U.S. 599 (1906); *Crabtree* v. *Madden,* 54 Fed. 426, 431-2 (8th Cir. 1893). In *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956), the district court, which was affirmed by the 8th Circuit, described the tribal tax as one levied "for the privilege of doing business on reservation land." 129 F. Supp. 15, 24 (D.S.D. 1955). The same tax was considered again in *Barta* v. *Oglala Sioux Tribe of Pine Ridge Res.*, 259 F.2d 553 (8th Cir. 1958), *cert. den.* 358 U.S. 932 (1959), wherein the court held the United States Constitution did not apply to tribal taxation.

(Ct.App.Ind.T. 1900), aff'd 105 Fed. 1003 (8th Cir. 1900). The Court of Appeals for the Indian Territory therein quoted directly from the 1884 Opinion of Attorney General Phillips, *supra,* saying:

> In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor . . . I submit that, whatever this may mean, it does not limit the right of these tribes to pass upon the question, who (of persons indifferent to the United States, *i.e.* neither employes, nor objectionable) shall share their occupancy, and upon what terms. That is a question which all private persons are allowed to decide for themselves; and even wild animals, not men, have a certain respect paid to the instinct which in this respect they share with man. The serious words 'jurisdiction' and 'self-government' are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants. 54 S.W. at 809.

In the present case, however, the Jicarilla Apache tribe has already made that determination. Over the last three decades, Petitioners have executed numerous oil and gas leases with the Jicarilla Apache tribe. Several Petitioners paid substantial bonuses for such leases, and all Petitioners have paid substantial rental and royalty fees to the United States Geological Survey for the benefit of the tribe.[33]

In the instant case, Petitioners entered long-term oil and gas leases with the Jicarilla Apache Tribe at a time when no American Indian tribe had ever attempted to enforce a severance tax against non-Indian mineral lessees. Moreover, when the vast majority of these leases were executed, the Jicarilla Apache Tribal Constitution did not even purport to grant the tribal

[33] R. 71-2; Pl. Ex. 1, R. 88.

council any authority to levy taxes against non-Indians. Only after Petitioners had invested substantial sums of money developing the leases and paid the Jicarilla Apache Tribe considerable sums as rentals and bonuses, did the tribe amend its Constitution purportedly to allow the severance taxes at issue. If a tribe can impose upon the holder of a federal lease a condition not included or provided for in the written instrument, and then exclude the holder from Indian lands for failure to comply with that condition, then the possessory interest can be made a practical nullity by the unilateral action of the tribe.[34] No proprietary power can justify such a result.

POINT II

B

THE JICARILLA SEVERANCE TAX DOES NOT MEET THE CRITERIA FOR TRIBAL TAXATION ESTABLISHED IN *COLVILLE*

Since this Court recently considered the power of a tribe to tax non-Indians entering the reservation to purchase cigarettes, an analysis of *State of Washington* v. *Confederated Tribes of the Colville Indian Reservation,* . . . . U.S. . . . . , 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980) appears appropriate. In *Colville* this Court held, *inter alia,* that an Indian tribe may impose a tribal tax on cigarettes sold on the reservation. Similarly, the majority in *Colville* acknowledged the tribal power to tax involved "non-Indians *entering* the reservation to engage in economic activity." . . . . U.S. . . . . , 65 L.Ed.2d at 29, 100 S.Ct. at 2081. (emphasis added). In *Colville,* however, the majority specifically recognized that even non-Indians living on the reservation could "travel

[34] Both paragraph 3(g) of the typical lease (J.A. 27) and 25 CFR § 171.28 prohibit any regulation which would operate to affect the term of the lease or rate of royalty. Even if the tribe had legitimate governmental authority, it could not abrogate such contractual obligations. *People of Puerto Rico* v. *Russell & Co.,* 315 U.S. 610, reh. den. 316 U.S. 708 (1942); *cf., United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 26 (1977).

elsewhere" to purchase their cigarettes, if they wished to avoid the tribal tax. .... U.S. ...., 65 L.Ed.2d at 32, 100 S.Ct. at 2083. The non-Indian thus had no vested property right in purchasing tribal cigarettes. No doubt because of the lack of potential for compulsive coercive enforcement of their taxes by the tribes in *Colville,* this Court did not find an overriding federal interest which would be frustrated by the tribal taxes. .... U.S. ...., 65 L.Ed.2d at 29, 100 S.Ct. at 2081. The Court also expressly recognized that the relevant treaties involved could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. . ." .... U.S. ...., 65 L.Ed.2d at 31, 100 S.Ct. at 2082. It thus appears that at base, the Court upheld the tribal power to add its tax to the sale of cigarettes because the tribe could exclude non-Indians wishing to enter the reservation to purchase cigarettes, and the non-Indians could choose whether to enter the reservation and purchase cigarettes with knowledge in advance of the tribal tax.

But what of non-members, like Petitioners, whose conditions with respect to entry onto the reservation have already been met and whose expenditures under their federally sanctioned leases are such that they cannot possibly be asked to "travel elsewhere"? *Colville,* .... U.S. ...., 65 L.Ed.2d at 32, 100 S.Ct. at 2083. Petitioners did not agree to pay the tax nor can they be excluded from their leaseholds and easements which set forth the only conditions imposed by the United States and the Tribe for their initial entry. The application of the tribal taxes in *Colville* to non-Indians who voluntarily entered the reservation as tribal invitees with knowledge of the tax is therefore dramatically different than the application of the Jicarilla severance tax to Petitioners.

Even if the factual situation in *Colville* were analogous, the Jicarilla tax does not meet the *Colville* criteria for tribal taxation of non-Indians. Justice White recognized that tribal powers

of taxation, even respecting otherwise valid tribal interests, may be divested by overriding national interests as well as by federal law and necessary implication of their dependent status. .... U.S. ...., 65 L.Ed.2d at 28, 100 S.Ct. at 2081.

The dependent status of the Jicarilla Apaches does not allow them to impose additional financial and administrative burdens upon lessees operating under federally approved and regulated leases. The Jicarillas are also divested by federal law of their power to impose severance taxes on oil and gas severed from their Executive Order Reservation. (*See,* Point III, *infra*). Moreover, the Jicarillas do not have the requisite "significant interest" to tax oil and gas production under what are essentially federal leases.[35] Not only is energy production a national, rather than a tribal interest, it is the federal government which holds actual legal title to the oil and gas.[36]

Even if the tribe had an otherwise significant interest in the leases,[37] the taxation and regulation of oil and gas production is not a matter which merely involves the tribe or its members. It is rather a matter of national public interest. Indian mineral taxes will inevitably either cause further increases in the cost of

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[35] Indian title to reservation land is recognized to be only a right of occupancy completely extinguishable at will by the fee owner, the federal government. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974)

[36] The Jicarilla Reservation was created by Executive Order rather than a treaty ratified by Congress. (J.A. 142.) Whatever tribal interest exists in Executive Order Reservations may be completely terminated by either the President or Congress without payment of any compensation to the tribe. *Sioux Tribe* v. *United States,* 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86 (1949); *cf., United States* v. *Sioux Nation of Indians,* .... U.S. ...., 65 L.Ed.2d 844, 875, n. 29, 100 S.Ct. 2716, 2740 (1980); 25 C.F.R. § 171.2.

[37] Tribal economies have not traditionally been based on mineral production. Allen, *State Conservation of Oil and Gas,* 5 Rocky Mt. Min. L.I., 59, 70 (1960); Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, 69 Cong. 1st Sess., pp. 8-17 (February 19, 1926).

energy to consumers, or discourage production from marginal wells on Indian lands, or both. This would be contrary to the two national goals of increasing domestic energy supply and limiting further price increases for domestic energy.[38]

POINT III

CONGRESS HAS PREEMPTED THE FIELD OF TAXATION OF OIL AND GAS ON EXECUTIVE ORDER INDIAN RESERVATIONS BY 25 U.S.C. § 398c AND A TOTAL FEDERAL REGULATORY SCHEME

The right of tribal self-government is ultimately dependent upon, and subject to, the broad power of Congress. *White Mountain Apache Tribe* v. *Bracker,* .... U.S. ...., 65 L.Ed.2d 665, 672, 100 S.Ct. 2578, 2583 (1980); *Colville, supra,* .... U.S. ...., 65 L.Ed.2d 10, 29-34, 100 S.Ct. 2069, 2081-5 (1980). Congress has expressed its intent to preempt any tribal taxation power possessed by the Jicarillas in 25 U.S.C. § 398c.[39]

No treaties were ever made by the Jicarilla Apache tribe, and by the provisions of 25 U.S.C. § 71, Congress determined that as of 1871 Indian tribes were no longer to be regarded as independent sovereigns. Thereafter, as this Court stated, "the

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[38] *See, e.g., Energy Policy and Conservation Act,* 42 U.S.C. § 6201, *et seq.; Energy Supply and Environmental Coordination Act,* 15 U.S.C. § 791 *et seq.*

[39] 25 U.S.C. § 398c, reads in full:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive Order Indian Reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

Government began to regulate their affairs through statute or through contractual agreements ratified by statute." *DeCoteau* v. *District County Court,* 420 U.S. 425, 432 (1975), *reh. den.* 421 U.S. 939 (1975); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 72 (1962). Since no Jicarilla treaty had been ratified prior to 1871, when Congress terminated recognition of the remaining recalcitrant Indian bands, the Jicarilla Reservation was created by Executive Order.[40] In light of the purposes of 25 U.S.C. § 71 and the marked change in attitude it represented, Congress adopted a somewhat hostile attitude toward reservations created exclusively by the President after 1871. It is from this historical perspective that the broad policies that underlie 25 U.S.C. § 398c should be judged. *White Mountain, supra,* .... U.S. ...., 65 L.Ed.2d 665, 672-73, 100 S.Ct. 2578, 2583-84 (1980).

The original bill as passed by the Senate during the 1924 Session provided that the Indians would receive all of the royalties from gas and oil leases on Executive Order Reservations.[41] After numerous amendments attempting to divide the royalties and taxes equitably among the tribes, the states and the federal government,[42] the joint conferees agreed to give the Indians 62.5% and the states 37.5% of the royalty. In defending the conference committee report, Representative Hayden articulated the rationale for granting the states taxation power:

> Each House had previously agreed that a share of the benefit to come from the development of oil, gas, and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue the conference had before

[40] *See,* Seth Dissent, (J.A. 170) and Executive Orders, (A.P.C. 116).

[41] 66 Cong. Rec. 999 (1924).

[42] 66 Cong. Rec. 2234, 2799 (1925).

them, and they had jurisdiction to determine that question. 66 Cong. Rec. 5433 (1925).[43]

In 1926, a bill giving all royalties to the tribe was passed by both the House and Senate but vetoed by the President.[44] The eventual compromise passed and signed by the President in 1927 allowed the states to tax all the oil and gas produced, but awarded the tribes the right to all royalties.

It is clear that in passing this legislation, there was substantial sentiment in Congress that although Indians are entitled to their treaty reservations, the Executive Order reservations were a gift from the Executive Branch at the expense of the states wherein they were located.[45] Several statements of Congressional leaders illustrate that a prime goal of the legislation was to allow the states to retain adequate revenue bases even though large percentages of their territories were occupied by federal enclaves.[46] The bill finally adopted reached a compromise by giving the Indians the exclusive royalty rights and the states the exclusive right of taxation.

Congress did not intend that the states should be deprived of their royalty rights and also have to share the right to tax with the Indians. *See,* Barrett Dissent, (J.A. 186). Indeed, it is clear that no one involved believed Indian tribes had any power to levy a severance tax. Commissioner of Indian Affairs Charles Burke pointed out that unless the tribes were given a share of the royalties, they would not receive any benefit from these

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[43] In spite of Congressman Hayden's defense, the Bill was defeated in the 1925 Session on a point of order. 66 Cong. Rec. 5433-34 (1925).

[44] 67 Cong. Rec. 10912, 11397 (1926), S.Doc.No. 156, 69th Cong. 1st Sess. (1926).

[45] 67 Cong. Rec. 10915, 10995 (1926); 68 Cong. Rec. 4569 *et seq.* (1927).

[46] *See,* Conf. H. R. No. 1637, 68th Cong. (March 3, 1925); 68 Cong. Rec. 10912-19 (1926); 68 Cong. Rec. 11391 (1926); Remarks of Congressman Morrow, 68 Cong. Rec. 4703 (1927).

leases.[47] A more recent Congressional study also recognized that Indians have traditionally been limited to royalties, and, implicitly, that 25 U.S.C. § 398c would have to be repealed to allow tribal severance taxes.[48]

If Congress had intended to permit both the states and the tribes to benefit from taxation of oil and gas revenues, it would have so provided in explicit terms. Earlier legislation demonstrates that Congress knew how to permit the Secretary of the Interior to collect taxes on behalf of the Indian tribes when it so intended. For example, 25 U.S.C. § 319 provides for rights-of-way through Indian reservations for telephone and telegraph lines. This statute, enacted in 1904, also allows the Secretary of the Interior to impose taxes for the benefit of the Indians, but only when such rights of way "are not subject to state or territorial taxation." *See also,* 25 U.S.C. § 321.

These statutes demonstrate Congress knew that the tribes had no inherent powers of taxation over non-Indians granted access to the reservation, but that such powers must be expressly granted by Congress and exercised not by the tribes but by the Secretary for their benefit. It also illustrates how solicitious of the state tax base, *vis-a-vis* Indian reservations, the Congress was during this period.

In the case of oil and gas production from these Executive Order lands, Congress has never permitted a tax to be collected for the tribes. The State of New Mexico, moreover, has vigorously asserted its taxing authority over this same oil and gas to the exclusion of any additional tribal tax. Congressional sanction of further erosion of the state tax base seems especially unlikely since Congress recognized obligations of the states to

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[47] Hearings before Subcommittee of the Committee on Indian Affairs on H.R. 9133, 69 Cong. 1st Sess., pp. 20-25, 45 (February 19, 1926).

[48] *Final Report of the American Indian Policy Review Commission,* pp. 181, 344 (1977).

provide Indian reservations with vital governmental services during this same period.[49]

Even if 25 U.S.C. § 398c did not preempt tribal taxation, however, the Secretary of the Interior specifically approved each of Petitioners' leases. The fact that the Secretary has approved these leases is significant for, pursuant to 25 U.S.C. § 396d, the Secretary has adopted a federal regulatory scheme, codified in 25 C.F.R. Part 171 and 30 C.F.R. Part 221, so pervasive as to preclude any additional burdens by the tribe. The Secretary, under that scheme, is specifically prohibited from approving any regulation which would unilaterally increase the rate of rental or royalty.[50]

In a similar factual context, this Court recently held that no additional tax burden could be imposed on tribal timber lessees because the federal regulations were so pervasive. *White Mountain Apache Tribe* v. *Bracker*, . . U.S. . . , 65 L. Ed.2d 665, 100 S.Ct. 2578 (1980), held that Arizona could not impose its motor carrier license tax and fuel use taxes on a non-Indian

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[49] *See, e.g.,* 66 Cong. Rec. 2799 (1925); Hearings of the Subcommittee of the Committee on Indian Affairs on HR. 9133, 69th Cong. 1st Sess., pp. 11-14, 17, 20 (February 19, 1926); 25 U.S.C. § 231, § 452.

[50] Paragraph 3(g) of Petitioners' leases tracks 25 C.F.R. § 171.28 which contains the following proviso:

> Provided, that no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease. All former regulations governing the leasing of tribal lands for mining purposes are superceded by regulations in this part.

By approving the Jicarilla severance tax, the Secretary has, in effect, approved a regulation increasing the royalties to the tribe. (R. 70-1). The Court of Appeals, however, refused to consider this issue since it found the tribal tax valid. (J.A.161) Under this logic, the Secretary could avoid his legal and contractual obligations under the guise of merely approving tribal actions rather than affirmatively doing the prohibited act himself.

corporation approved by the Secretary of the Interior and operating under a federally recognized timber contract. After pointing out that timber on reservation land is owned by the United States for the benefit of the tribe and cannot be harvested without Congressional consent, the Court went on to note that the tribal timber company contracted with the United States to harvest timber, "pursuant to regulations of the Bureau of Indian Affairs." . . U.S. . . , 65 L.Ed.2d at 670, 100 S.Ct. at 2581, and that such activities were "subject to extensive federal control." *Ibid.* The Court further noted that all contracts for reservation logging required the express approval of the Secretary of the Interior. The majority in *White Mountain*, therefore, concluded that the federal regulation of logging on Indian reservations was so pervasive as to be preemptive of further tax burdens. In reaching this conclusion the Court recognized that the scope of federal preemption is "not dependent on mechanical or absolute conceptions of state or tribal sovereignty." . . U.S. . . , 65L.Ed 2d at 673, 100 S.Ct. at 2584. Speaking for the Court, Justice Marshall concluded:

> The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors. . . U.S. . . , 65 L.Ed.2d at 676, 100 S.Ct. at 2587.

In a companion case, *Central Machinery Co.* v. *Arizona State Tax Commission*, . . U.S. . . . , 65 L.Ed.2d 684, 100 S.Ct., 2592 (1980), this Court again found federal preemption of additional tax burdens on federally approved contracts with an Indian tribe. In that case, Central Machinery, a non-Indian enterprise, sold eleven tractors to the Gila River Indian Tribe. Arizona attempted to impose its transaction privilege tax on the gross receipts of that sale. As in *White Mountain, supra*, this Court detailed the facts leading to its conclusion that, "the Federal

Government has comprehensively regulated trade with Indians." . . U.S. . . , 65 L.Ed.2d at 688, 100 S.Ct. at 2595. It concluded that "It is the existence of the Indian trader statutes, then, and not their administration, that pre-exempts the field of transactions with Indians occurring on reservations." . . U.S. . . , 65 L.Ed.2d at 689, 100 S.Ct. at 2595-6.

The Secretarial supervision of Petitioners through the United States Geological Survey and the Bureau of Indian Affairs is no less pervasive as to oil and gas than it was found to be in *White Mountain* with regard to timber. Under 25 C.F.R. Part 171 and 30 C.F.R. Part 221 every facet of Petitioners' operations are dictated, regulated, supervised, and monitored by Federal authorities. Indeed this regulation is far more pervasive than that found to preempt totally the field of trading with the Indians in *Central Machinery.* Petitioners respectfully submit, therefore, that the Jicarilla tax adds an additional burden not contemplated by the Federal regulations and expressly prohibited to the Secretary himself.

POINT IV

IF INDIAN TRIBES HAVE THE INHERENT GOVERNMENTAL POWER TO IMPOSE TAXES ON NON-INDIANS, NON-INDIAN CITIZENS ARE ENTITLED TO THE BENEFIT OF CONSTITUTIONAL PROTECTIONS AGAINST ABUSES OF TRIBAL GOVERNMENTAL AUTHORITY

The resolution of tribal authority over non-Indians has serious practical and Constitutional consequences.[51] Many Indian advocates and lower courts have stated[52] that tribal actions are

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[51] *Oliphant,* v. *Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978); *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408, 412 (9th Cir. 1976).

[52] *See, e.g.* Note, 1979 Wash.U.L.Q. 879, 905; Johnson and Crystal, *Indians and Equal Protection,* 54 Wash. L.R. 587, 617 (1979), *United*

not subject to those constraints of the United States Constitution which are designed to protect the people from abuses of governmental authority. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978), for example, this Court recognized:

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. 436 U.S. at 56.

The facts involved, and language employed, in *Santa Clara* emphasize that the lack of Constitutional inhibitions on tribal government applies only, however, when the tribe is dealing with its own members in areas traditionally regulated by Indian custom. A careful review of the opinion in *Santa Clara* leads to the conclusion that this Court recognized that Constitutional restraints upon tribal government were not necessary because tribal government has authority only on internal matters traditionally governed by Indian practices and customs. 436 U.S. at 55-56.

Given this Court's holdings that Indian tribes are not constrained by the Constitution, two alternatives exist: (1) either such tribes cannot have authority over non-Indians; or (2) non-Indian citizens can be totally deprived of their Constitutional rights by Indian tribes.[51]

Logic dictates that since tribal customs and traditions differ from the Anglo-American concept of jurisprudence, the United States Constitution need not be injected into the relationship

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States v. *Karlen,* 476. F. Supp. 306 (D.S.D. 1979); see also cases cited by this Court in *Santa Clara, supra,* 436 U.S. at 56, n. 7.

[51] The ambivalence of the Tenth Circuit over this dilemma can be seen in its opinion which found the Due Process clauses of the Fifth and Fourteenth Amendments embodied a "national, if not sovereign interest" but failed to deal with Petitioners' other Constitutional claims, including the Equal Protection challenges.

between tribal members and their government.[54] By attempting to assert independent jurisdiction over non-Indians, however, tribal government calls into serious question the *raison d'etre* of tribal sovereignty itself. Moreover, by seeking to extend jurisdiction to non-Indians, the tribes ignore the substantial changes in their status and circumstances which have transpired since the decision in *Worcester* v. *Georgia*.[55] To indulge governmental sovereignty by Indian tribes would effectively create foreign enclaves within the States. Moreover, these enclaves would be curiously populated, and in fact governed, by a privileged class of American citizens who may accept the benefits, without the burdens, of such citizenship. Perhaps even more remarkably, these enclaves would be governed by tribes unconstrained by the fundamental precepts of American law and thereby free to exploit, expropriate, and expel other Americans as they see fit unless the Constitution limits their actions and "infringes on their right to make their own laws and rule others by them." [56]

An extension of tribal sovereignty to non-Indians would not serve the religious, cultural, and historical purposes of "tribal sovereignty." To the contrary, by extending tribal sovereignty to encompass affirmative jurisdiction over non-Indians, tribes are given an open invitation to discriminate, on an organized governmental level, against American citizens precisely because

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[54] *Groundhog* v. *Keeler*, 442 F.2d 674 (10th Cir. 1971); *Howlett* v. *Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976); *White Eagle* v. *One Feather*, 478 F.2d 1311 (8th Cir. 1973).

[55] 31 U.S. (6 Pet.) 515 (1832). *See also, Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 171-2 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973).

[56] This is a paraphrase of the test laid down in *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), wherein the Court used the infringement test for a defensive purpose to prevent encroachment of State jurisdiction over transactions directly involving tribal members and extensively regulated by the federal government.

of race and national origin. No interest in cultural identity can excuse the Draconian consequences for the remainder of society.

Today any tribal jurisdiction over non-Indians seems unthinkable without a corollary right of general participation for non-Indians in tribal government. No Constitutional value is more central to our notion of political justice than that subjection to governmental power presupposes the right to petition and participate in that government on an equal basis. Indeed this Court has very recently reiterated that, "In this Nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall,* 440 U.S. 410, 426, reh. den. 441 U.S. 917 (1979). Participation in the election, deliberations and proceedings of Indian tribal councils is, however, denied non-Indians. Once tribal government asserts sovereign governmental powers over non-Indians, the most pivotal values in American democracy are imperiled.[57]

The views of Congressman Meeds in his dissent to the Final Report of the American Indian Policy Review Commission, which were approvingly quoted by this Court in *Oliphant,* 435 U.S. at 205, n.15, amplify the same principle:

> There are few values more central to our society than the belief that governments derive 'their just powers from the consent of the governed.' Government by Indian tribes over non-Indians, if allowed to take place, would be a clear exception to that principle. A heavy burden of justification should fall on those who would subject some of our citizens

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[57] This Court has frequently recognized equal franchise is necessary for those substantially affected by governmental action. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Avery* v. *Midland County,* 390 U.S. 474 (1968). To make a non-Indian completely subject to tribal government within the reservation enclave when he is completely disenfranchised by the tribe would violate the Constitutional concept of equal protection. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970). To the extent that this disenfranchisement cannot be remedied because of the non-Indians' racial status, it is even more suspect. *Terry* v. *Adams,* 345 U.S. 461, reh. den. 345 U.S. 1003 (1953).

> to the coercive powers of others without any opportunity or right to join in the deliberations and decisions which determine how that power is to be exercised. Those who assert that Indian tribes should be allowed to rule non-Indians offer little justification other than an appeal to the abstraction of 'sovereignty.' But our society sees no distinction between the rulers and the ruled; all citizens enjoy both statuses. There is little reason shown why academic deductions from the metaphor of 'sovereignty' should take precedence over the Declaration of Independence and the first principles of democracy.
>
> Consequently, it is all the more inappropriate that Indian tribes should exert governmental power over resident non-Indians who plainly would be entitled to vote and participate in tribal government were it not for the accident of their race.

The decision of the Court of Appeals below would subject non-Indians to just such tribal governmental power without allowing them any right to petition or participate. Chief Judge Seth, in dissent, clearly recognized this flaw in the majority reasoning, saying:

> The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundations of governmental authority as it exists in the United States. (J.A. 169).

Judge Seth also observed governmental "sovereign power" should not be attributed to Indian tribes, precisely because of their failure to allow non-members to participate:

> The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is how it should be for self-determination; however, such a group of tribal members excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on

representation with an opportunity to participate. When this is provided, authority exists to govern. (J.A. 170-71).

To hold that non-Indians lose their Constitutional rights merely by entering an Indian reservation contravenes the long established principle that the Constitution is binding on all within the territory of the United States, and does not contemplate such exempt enclaves. *Southern R. Co.* v. *Greene,* 216 U.S. 400, 412 (1910); *cf., Healy* v. *James,* 408 U.S. 169, 180 (1972). As this Court noted in *Colville, supra,* .... U.S. ...., 65 L.Ed.2d at 20, 100 S.Ct. at 2073, the intricate problem of state and Indian taxation jurisdiction is a "vexing area" in which the interests of state and federal governments as well as the tribes have to be analyzed. To hold that Indian tribes may govern non-Indians without regard to Constitutional guarantees would infringe upon the legitimate interests of both state and federal governments. *Washington* v. *Confederated Bands and Tribes of Yakima Indian Nation,* 439 U.S. 463, 502, *reh. den.* 440 U.S. 940 (1979); *cf.,* Grant, *The Scope and Nature of Concurrent Power,* 34 Colum.L.R. 995, 1000-02 (1934).

If Indian tribes are to be given general governmental authority over non-Indians, they must be subject to all the limits on governmental authority provided for in the Constitution. Without Constitutional restraint, tribal action could expropriate property worth hundreds of millions of dollars and banish non-Indian citizens rightfully on reservations under federal authority. When the enforcement of tribal taxation involves the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property, tribes would be exercising criminal jurisdiction forbidden them.[58]

Even if such harsh sanctions are prohibited to the tribes, any procedure which allows a government to impose the full panoply of taxation against those of a different culture and race,

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[58] *Oliphant, supra; Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976); *Crabtree* v. *Madden,* 54 F. 426, 431 (8th Cir. 1893).

without any avenue for the latter to protect themselves from, or participate in, the decision seems unthinkable. In *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 210 (1978) this Court relied upon its earlier decision in *Ex parte Crow Dog,* 109 U.S. 556 (1883). The Court's observations in the earlier case as to why it would be inappropriate to construct coercive non-Indian jurisdiction over Indians applies equally well to the converse situation herein. The Court found that jurisdiction, in the absence of a narrowly defined Congressional authorization, would be inappropriate since it would submit Indian offenders to judgment "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . " *Ex parte Crow Dog, supra,* at 571.

Extra-constitutional powers of tribal taxation over non-Indians lawfully present on the reservation would create the same inequities recognized in *Crow Dog* and unfettered tribal power over non-Indians would not advance any legitimate goal of Indian self-government. To allow non-Indians equal participation in tribal government, on the other hand, would completely frustrate the legitimate purpose of tribal sovereignty by destroying cultural identity and Indian traditions.

POINT V

THE JICARILLA TAX VIOLATES THE COMMERCE CLAUSE

Approximately 80% of the oil and gas produced from the Jicarilla Apache Reservation immediately enters interstate commerce. (J.A. 129). Indeed, even prior to the time it is produced, much of this oil and gas is committed under long-

term contracts to interstate markets and regulated by Federal agencies.[59]

The Court of Appeals in dealing with the Commerce Clause in this case again demonstrated the difficulty inherent in attributing governmental power to Indian tribes without express Constitutional limitations. In struggling to apply the Constitutional standard designed for the federal and state governments to Indian tribes, the majority said:

> It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. (J.A. 153).

It is true that no court has specifically analyzed how tribes are limited in their taxing power by the Commerce Clause. Congressional power over Indian commerce, however, is at least as great as its power over commerce "among the several states."[60] Indeed a strong argument can be made that the power of Congress "to regulate Commerce . . . with the Indian tribes" is greater than its power to regulate commerce among the several states because the former is not subject to federalism and state sovereignty limitations. *See, National League of Cities* v. *Usery,* 426 U.S. 833 (1976); *cf., Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). Although at one time this Court had adopted a fairly restrictive view of Congressional power over Indian Commerce, *Matter of Heff,* 197 U.S. 488 (1905), more recent decisions have upheld Congressional regulation which bears some reasonable relationship to that power. *United States* v. *Nice,* 241 U.S. 591 (1916), overruling *Heff, supra; cf., United States* v. *Mazurie,* 419 U.S. 544 (1975). Federal regulation, pursuant to

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[59] R. 55-57; 72-6, 209-210; Pl. Ex. AM-1, R. 228-9. *See also, Jicarilla Apache Tribe* v. *Supron Energy Corp.,* 479 F.Supp. 536, 542-4 (D.N.M. 1979).

[60] *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U.S. 617, 620 (1903); *U.S.* v. *Seveloff,* 27 F.Cas. 1021, 1024 (D.Ore. 1872). (No. 16, 252).

Congressional authorization, of the production of oil and gas from Indian reservations therefore preempts local regulation.

Moreover, the Commerce Clause, of its own force, restrains local burdens on the stream of interstate commerce.[61] If such local governments could tax oil and gas beyond their boundaries they could subject interstate commerce to intolerable burdens.[62]

Indian tribes should not be allowed to impose burdens on interstate commerce which are prohibited to the states. The Court of Appeals for the Eighth Circuit considered the effect of this Constitutional limitation upon a tribal ordinance in *Muskogee National Telephone Co.* v. *Hall,* 118 F.382 (8th Cir. 1902). In the *Muskogee* case, the Creek Nation granted Muskogee Telephone an exclusive franchise to construct and operate a telephone system within the Creek Nation. Judge Thayer, speaking for a unanimous Court, said:

> But, be this as it may, telephone companies, like telegraph companies, are important agencies in the transaction of interstate commerce, and no state can grant to one telephone company the exclusive right to operate telephone lines within it borders; and what a state cannot do, because it operates as an obstruction to the free flow of interstate commerce, the Creek Nation (which is said to embrace as much territory as some of the states) cannot do. (118 F. at 384-5).

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[61] *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.,* 265 U. S. 298 (1924); *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell,* 424 U. S. 366 (1976); *cf., National Bellas Hess, Inc.,* v. *Department of Revenue,* 386 U.S. 753 (1967).

[62] *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157 (1954); *Eastern Gulf Oil Co.* v. *Kentucky State Tax Commission,* 17 F.2d 394 (E.D.Ky. 1926).

The State of New Mexico collects at least four separate taxes on the severance of this same oil and gas.[63] The Jicarilla tax would, therefore, also place a multiple burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

The Court of Appeals opinion recognizes that New Mexico imposes severance taxes upon the same oil and gas to which the Jicarilla severance tax would apply. (J.A. 155). The majority, however, dismissed the multiple burden argument by reasoning:

> It is beyond question that no state, *with the exception of New Mexico,* has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support a levy of a severance tax on lessees' occupation. *There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause.* That New Mexico may be able to impose an identical tax on leases does not implicate federal interest in maintaining the flow of interstate commerce at all, we believe. (J.A. 156). (emphasis added).

The Court of Appeals thus ignored the Constitutional proscription against multiple burdens upon interstate commerce. If, as the majority and concurring opinions hold, an Indian tribe is indeed analogous in governmental power even to a local government, then it is clear that tribal taxation must be subject to dual Commerce Clause scrutiny. *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951). Taxation of a single event by more than one government works to the advantage of local commerce because local commerce cannot be so frequently taxed. *Central R. Co.* v. *Pennsylvania,* 370 U.S. 607 (1962).

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[63] (J.A. 129), New Mexico imposes up to six oil and gas severance taxes on some of this oil and gas. (R. 57). If valid, the Jicarilla tax combined with the State severance taxes would create a total tax burden of more than 29% of the price of old gas and over 12.5% of the price of old oil. (J.A. 130).

Since the Jicarilla tax, by its terms, applies only to gas "sold or transported off the reservation," its effect is to subject gas moving off the reservation to multiple taxation to which gas remaining on the reservation is not exposed. This form of discriminatory multiple taxation is prohibited by the Commerce Clause. *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938); *Standard Oil Co.* v. *Peck,* 342 U.S. 382, 385 (1952). A tax which exempts local goods or events while taxing interstate transactions is therefore invalid.[64]

If, as the Court of Appeals held, the Jicarilla tax is levied on the incident of severance of the oil and gas from the Reservation, then it constitutes an impermissible burden upon interstate commerce because New Mexico taxes the same "local" event. The Court of Appeals dismissed this burden since only two entities would impose taxes on the single event of severing oil and gas. This highlights the pernicious effect of the majority's holding, which creates impermissible governmental enclaves within the territorial boundaries of the existing states. The creation of these "local" governments within the existing states, but not subject to their jurisdiction, would allow "local taxes" by both tribal and state governments.[65] The majority opinion below creates a unique legal situation where several totally autonomous sovereign governments exist within the borders of a State of the Union and all can tax without coordination or restriction, at least until the combined level reaches

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[64] *Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318 (1977); *West Point Wholesale Grocery Co.* v. *City of Opelika,,* 354 U.S. 390 (1957); *Darnall & Son Co.* v. *Memphis,* 208 U.S. 113 (1908).

[65] The problem may be illustrated by the fact that California alone has 66 Indian reservations within its borders. Arizona's mere 17 reservations occupy territory larger than 13 of the States, and cover one-third of Arizona's 114,000 square miles. Federal and State Indian Reservation and Indian Trust Areas, U.S. Department of Commerce (1974).

confiscation. Such widespread establishment of Indian taxation would effectively destroy existing State taxation.[66]

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals for the Tenth Circuit should be reversed, and the Jicarilla Apache Tribe severance tax ordinance should be declared unlawful and void.

Dated: 20th November, 1980 A.D.

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[66] The Court of Appeals pointed out that after the present case was tried but while it was on appeal, this Court altered the standard for measuring the impact of a regulation on interstate commerce in *Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978). The Court of Appeals refused to consider whether the tribal tax was fairly apportioned or to remand for any evidence on this point. (J.A. 154).

No. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-11

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, ET AL., *Petitioners,*

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, Secretary of the Interior, *Respondents.*

No. 80-15

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY, *Petitioners,*

v.

JICARILLA APACHE TRIBE, ET AL., AND CECIL ANDRUS, Secretary of the Interior, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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IN THE

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OCTOBER TERM, 1980

No. 80-11 and 80-15

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JICARILLA APACHE TRIBE, ET AL., AND CECIL ANDRUS, Secretary of the Interior, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT JICARILLA APACHE TRIBE

STATEMENT OF THE CASE

Respondent, the Jicarilla Apache Tribe, resides on an Executive Order reservation located in northwestern New Mexico and has an estimated 2,100 inhabitants (75% Indian) with the majority residing in the town of Dulce, New Mexico, near the Colorado border. The reservation contains some 742,315 acres of land all of

which is tribal trust property.[1] 510,747 acres (68.8%) were leased for oil and gas as of October, 1980.[2]

Petitioners are oil and gas lessees of tribal trust land.[3] They operate under leases approved by the Secretary of the Interior pursuant to the Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g (J.A. 62-66, 122). Each Petitioner's lease states:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation. . . .

(J.A. 64).

The leases grant and lease to the lessee "the exclusive right and privilege to drill for, mine, extract, remove, dispose of all oil and natural gas deposits in and under" the leased premises. The term of the lease is for ten years and as long thereafter as oil and/or gas is produced in paying quantities from said land (J.A. 22-23).

The leases reserve to the lessor Indian tribe "the right to lease, sell or otherwise dispose of the surface of the lands" within the leased area. Nevertheless, this disposition is subject at all times to the right of the lessee to use so much of the surface "as is necessary in the extraction and removal of the oil and gas from the land herein described" (J.A. 27).

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[1] *See* Federal and State Indian Reservations and Indian Trust Areas, U.S. Department of Commerce 1974, at 356, for Reservation area. 1980 population figures are not available.

[2] Report, U.S. Geological Survey, Roswell, New Mexico Office, *Status of Leases and Wells on Indian Lands, South Central Region*, Oct. 1980.

[3] Of those Petitioners who are natural persons, none reside on the Jicarilla Reservation.

The lease attached to the Merrion and Bayless Complaint was issued April 24, 1953 and is still producing (J.A. 22). The lease attached to the Amoco Complaint was issued December 4, 1953 (J.A. 62) and is still producing. Thus, oil and gas lessees on the reservation essentially have unlimited access to the reservation and to the lands leased, with the right of exploration, drilling and operating for an indeterminate term of years, subject only to spacing regulations and such limited environmental controls as may be imposed by the Bureau of Indian Affairs and the United States Geological Survey.

The Tribe is governed by its Revised Constitution which was adopted by a vote of the qualified voters of the Tribe on December 23, 1968 in accordance with Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (D. Ex.B; R.IV, 98-99). The Revised Constitution as amended was approved by the Undersecretary of Interior on February 13, 1969 (R.II, 707, Finding 25). The tribal government is divided into legislative, executive and judicial branches, with the legislative body being the Tribal Council of eight members elected at large. The elected President or Vice President presides at Council meetings, voting only in event of a tie (D. Ex.B; R.IV, 98).

Article XI of the Tribe's Revised Constitution provides as follows:

> **Section 1.**
>
> The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal

> statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. (D. Ex.B).

Subparagraph (e) of Section 1, Article XI of the Constitution further provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation. *Ibid.*

Section 2 of this Article sets forth the procedure of enactment of ordinances which require Secretarial approval. *Ibid.*

The Jicarilla Apache Tribal Council on July 9, 1976 enacted an Oil and Gas Severance Tax Ordinance (J.A. 38-42) and a Severance Tax Permanent Fund Ordinance (D. Ex.D; R.IV, 98-99). The severance tax is expressly imposed on "any oil and natural gas severed, saved and removed from Tribal lands. . . ." (J.A. 38). The measure of the tax is five cents per million BTU of gas, and twenty nine cents per barrel of crude oil or condensate *measured by production from each well on the reservation* (*Id.* at 39-40, paras. 2, 3, 7). Royalty gas "taken by the Tribe in kind, and used by the Tribe" is exempt from the tax (*Id.* at 39, para. 4).

The operator of each well is liable for payment of the tax, and is required to report to the Tribe the volume of oil and volume and BTU content of gas, from each well on tribal lands for each month (*Id.* at 39, paras. 5, 6). There is a provision for tax refunds, payment of taxes under protest with an appeal to the Tribal Council of the Tribe in the event the protestant is dissatisfied with the decision of the Treasurer of the Tribe, and a

provision for "whatever legal action is appropriate under the laws of the United States", if the Tribal Council of the Tribe decides adversely to protestant (*Id.* at 41-42, paras. 11, 12).

The Tribe consents to to be sued either in the United States District Court for the District of New Mexico or the Jicarilla Apache Tribal Court for purposes of enforcement of tax refunds or refund of taxes paid under protest (*Id.* at 42, para. 13). Petitioners declined to pursue the tribal remedies provided; instead, they filed these actions in the District Court.

The Tribal Severance Tax Ordinance and Severance Tax Permanent Fund Ordinance were approved by the Acting Area Director, Bureau of Indian Affairs, on December 23, 1976 as a delegate of the Secretary of the Interior (*Id.* at 129, 143).

Prior to approval of the Severance Tax Ordinance, the Natural Resources Committee of the Tribe considered various alternative tax rates and procedures and made an extensive study of the impact of the severance tax on the consumer. A report prepared by Dr. Alfred L. Parker was made to the Tribe entitled *The Economic Impact of a Proposed Oil and Natural Gas Severance Tax* prior to adoption of the tax (D. Ex.N; R.IV, 133-37 *reprinted in* App. B, Respondents' Appendices to Brief in Opposition to Petition for Certiorari, hereinafter refered to as "Res. App."). This study, and the testimony of Dr. Parker, was the only evidence in the record of probative value as to the impact of the Jicarilla Apache Tax on the consumer. The study concluded that the tribal tax would increase the cost of gas to New Mexico consumers by 6/10 of 1 cent per MCF, and to interstate consumers by 1/10 of 1 cent per MCF. Since oil production on the Reservation is not large, 411,884

barrels in 1974 (D. Ex.N at 4), Dr. Parker concluded that the impact on oil prices was "very small indeed" (*Id.* at 5). The study concluded, on the basis of 1975 oil and gas production, that the impact on both interstate and intrastate consumers of oil and gas will be minimal, assuming that the tax is passed on to consumers.

The Court's finding that the combined state and tribal tax burden would amount to more than 29% of the interstate price of old gas and over 12 1/2% of the price of old oil (J.A. 130, Finding 36) was not substantiated. Petitioners' witness, Dugan, testified that the State of New Mexico tax on old gas was approximately 6.7%, and the new Jicarilla proposed tax would be 13.6%, for a total of 20.4% on old gas (R. IV, 58). He testified that as a small producer, he was entitled to a sales price of 30% above the 29.5 cent price (*Id.* at 57). No evidence was offered by Petitioners as to the ratio of small producers' gas or new gas to total gas produced on the reservation, or the relationship of the tax to the price paid by the consumer. The tax is only one component of all elements which are included in the cost of service of gas (R.VI, 290, Parker testimony; *see* p. 65 *infra*).

The finding of the District Court and the argument of the Petitioners that if producers were required to absorb the taxes, it would substantially limit their ability to operate profitably some existing wells (J.A. 130, Finding 34), was also not supported by the evidence. It was directed to the burden of the tax on oil production, but on cross-examination Mr. Dugan testified only as to one "marginal" well which was a *gas*, not an oil well (R.IV, 63-64). As to gas wells, he conceded he could pass on to the pipeline purchaser all of the tax (*Id.* at 55). The lease requirement as to production in paying quantities is

directed to production on the whole *lease*, not to single wells. Thus, the entire line of testimony proves nothing.

The Court's finding and the arguments of Petitioners as to the burden of the Jicarilla tax on oil and gas production is presently entirely without meaning and will be meaningless in the future because of deregulation of oil prices and provisions of the Natural Gas Policy Act of 1978 permitting the pass through of Indian severance taxes in determining natural gas ceiling prices (15 U.S.C. §3320; *see* p. 50; n. 36 *infra*).

The Tribe tendered substantial testimony and exhibits to establish that the tribal severance tax is a reasonable governmental means for the support of tribal government, preservation of the economy, and enhancement of the welfare of the Tribe, by providing revenues to supplement tribal income, particularly when the oil and gas resource is depleted and royalty payments diminish and cease.

The Affidavit of Richard TeCube, a member of the Tribal Council of the Tribe, was tendered to establish the substantial expenditures by the Tribe for law and order, fire protection, public work services, maintenance of roads and community center activities, which benefit non-tribal members, including Petitioners, as well as tribal members. This tender was denied admission (D. Ex.AA; R.VI, 306). These expenditures were also shown in Defendant's Exhibit P which was tendered to the Court but denied admission (R.VI, 278-90). That exhibit showed a tribal budget of $3,958,201 in fiscal 1976. Direct contributions to the tribal budget by the State of New Mexico were only $248,562 in that fiscal year (D.Ex.T; R. VI, 278-90).

The Tribe offered evidence as to operation by the tribal government of a police force of more than 20

uniformed policemen with a budget paid out of tribal funds of $184,168 in fiscal 1976, compared to one state police officer whose budget was $11,000 (R. VI, 301-02); evidence that would have established that the Tribe furnished various services, including the operation of a community center open to Indians and non-Indians (*Id.* at 302-03); and testimony as to operation of a game and fish department, which department collected state hunting and fishing license fees as well as tribal fees, and a Tribal Court with jurisdiction over criminal and civil matters involving tribal members (*Id.* at 303-05).[4] These tenders were objected to by Petitioners as irrelevant (*Id.* at 281) and denied by the Court (*Id.* at 305-06, Res. App.A).

The Brief of *Merrion and Bayless, et al.* in No. 80-11 will be referred to as "M&B Br."; the Brief of *Amoco Production Co., et al.* in No. 80-15 will be referred to as "Amoco Br."

SUMMARY OF ARGUMENT

Respondent submits that the authority of the Jicarilla Apache Tribe to levy a severance tax on production of oil and gas, imposed on non-Indians operating under leases approved by the Secretary of Interior on the Tribe's reservation, is a sovereign power of the Tribe which has never been successfully questioned. The power to impose this severance tax is based on the inherent sovereignty of the Tribe, reaffirmed by the Indian Reorganization Act. Moreover, the question of tribal

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[4] Exhibit P showed major tribal expenditures in 1976 for services which benefitted Petitioners as well as tribal members. Petitioners surely recognize, despite the smoke screen which they spread over the issues, that without a strong tribal government and maintenance of law and order, they would be unable to operate.

sovereign power to tax has been resolved by this Court in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, _____ U.S. _____, 100 S.Ct. 2069 (1980). The tax in this case cannot be distinguished from *Colville* in view of the repeated decisions of the courts and the opinions of the Attorney General of the United States acknowledging tribal power to tax non-Indian activities taking place on property situated on Indian trust lands, particularly where the Tribe has a significant interest in the subject matter.

The Jicarilla Apache tribal leases were issued under the 1938 Leasing Act, 25 U.S.C. §§396a-396g, and therefore the statutory authority of states to tax under the 1927 Leasing Act is irrelevant. Arguments of Petitioners that the power of tribal taxation of oil and gas production has been divested by the General Leasing Act of March 3, 1927, 25 U.S.C. §§398a-398e, are unsupported by the history of the leasing acts. Nor do the Mineral Leasing Act regulations authorized by Congress divest tribes of their sovereign powers of taxation.

Petitioners argue that the Jicarilla Apache severance tax is inconsistent with interests of the national government and particularly a national energy policy. If, in fact, there is a viable national energy policy, no conflict has been shown between the tribal tax and that policy. Moreover, Congress has expressly recognized Indian severance taxes in the Natural Gas Policy Act of 1978, Pub. L. 95-621, Title I, §110, 15 U.S.C. §3320.

Lastly, Petitioners argue that the Jicarilla Apache tribal severance tax violates the Commerce Clause of the Constitution. The Tribe submits that the Indian Commerce Clause provides the proper framework within which to test the tribal tax. The Indian Commerce Clause had as its purpose the protection of Indians from

outside trade interference and alienation of their lands without the consent of Congress. The Indian Commerce Clause does not in itself impose any implied restraints on Indian taxation. It is necessary to look, therefore, to specific legislation to determine whether Congress has in any way acted to restrict tribes' sovereign powers to tax. Congress has not done so. Rather, Congress has acted to affirm tribal power to tax activities of non-Indians on reservations.

Judging the Jicarilla Apache severance tax by criteria hertofore applied by this Court under the Interstate Commerce Clause to similar taxes on production of oil, gas and minerals, the tax does not constitute a prohibited multiple burden on interstate commerce. The activity taxed has a substantial nexus on the reservation; there is no discrimination in favor of tribal or other local business; and the tax is reasonably related to the services rendered by the tribal government, both to Indians and non-Indians.

ARGUMENT I

The Jicarilla Apache Tribe's Sovereign Power To Tax Extends To Severance Taxes On Production Of Oil And Gas On The Jicarilla Apache Reservation

A. *The Jicarilla Apache Tribe Has Power to Impose A Severance Tax on Oil and Gas Production on the Reservation by Reason of Its Inherent Sovereignty.*

The Jicarilla Apache severance tax is imposed on the act or privilege of producing or severing oil or natural gas on the Tribe's reservation and is measured by production at the wellhead. It is a common form of tax that is levied and assessed by numerous governmen-

tal entities. *See* nn. 37, 41, 45, *infra.* A similar New Mexico severance tax was so defined and upheld in the case of *Flynn, Welch & Yates* v. *State Tax Commission*, 38 N.M. 131, 136-37, 28 P.2d 889, 891-92 (1934).

Petitioners and Amici argue that tribal power to tax extends only to members of the Tribe and, therefore, the only authority to tax or regulate nonmembers of the Tribe is based on the power of the Tribe to exclude nonmembers from the reservation.[5]

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[5] Petitioners and Amici seek to overturn 75 years of historical and legal precedent confirming the general sovereign power of the tribes to tax by citing dicta, dissenting opinions, taking language of opinions of the Attorneys General out of context, and omitting significant portions of quotations to support a doctrine which this Court has never espoused. Merrion and Bayless Petitioners confuse the doctrine of limited sovereignty of a "domestic dependent nation" (*Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) with the lack of recognition of any governmental authority over non-Indians (M&B Br. at 13-14). Petitioners in that brief cite Justice Baldwin's "concurrence" in *Cherokee Nation* apparently seeking to convince this Court that Justice Baldwin agreed with the majority of the Court with respect to retention by a dependent nation of certain sovereign powers as set forth in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832):

> [A] weaker power does not surrender its independence — its right to self-government, by associating with a stronger and taking its protection.

On page 15 of the their Brief, the Merrion and Bayless Petitioners quote from *Choctaw Nation* v. *United States*, 119 U.S. 1, 27 (1886), emphasizing the statement that the Choctaw Nation falls within the description "not of an independent State or sovereign Nation, but of an Indian Tribe." Omitted are the next sentences stating that "[a]s such it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should

Arguments of the oil companies that the power to tax activities of non-Indians on tribal lands is not a part of the retained sovereignty of an Indian tribe, but rather an attribute of the tribe's power as a landowner to exclude non-Indians were expressly rejected by this Court just last term in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069 (1980). Relying on judicial precedents and opinions of the executive branch spanning 125 years, [6] this Court confirm-

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choose, as it did determine in the act of March 3, 1871, embodied in §2079 of the Revised Statutes, to exert its legislative power."

Similarly, the M&B Brief on page 16 quotes from Justice Rehnquist's opinion in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), citing a 1960 Senate Report and stating "*[t]his is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.*" 435 U.S. at 205. Petitioners omit the sentence following: "Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." *Id.* at 205-06.

Petitioners seek to convince this Court that *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978) recognizes a complete "divesture [sic] of tribal sovereignty" with respect to tribal relations with non-Indian society (M&B Br. at 16). However, Petitioners omit the sentence following the quote: "Thus Indian tribes can no longer fully alienate to non-Indians the land they occupy." Similarly, on page 17 of that brief, again quoting from *Wheeler*, Petitioners, in arguing a conclusion of general limitation of powers of self-government, fail to mention the three specific limitations on powers of self-government referred to in the quotation of Justice Stewart: (1) alienation of lands; (2) relations with foreign nations; and (3) trying non-members in tribal courts.

[6] The existence of these authorities refutes the Petitioners' complaint that they had no way of knowing that the Jicarilla Apache Tribe might impose taxes on their leases (Amoco Br. at 13 n. 12).

ed in *Colville* that the power to tax "is a fundamental attribute of sovereignty", rejecting the arguments that the tribes in question lacked governmental power to impose a tax on nontribal purchasers. The Court held:

> At the outset, the State argues that the Colville, Makah, and Lumini Tribes have no power to impose their cigarette taxes on nontribal purchasers. (footnote omitted). We disagree. The *power to tax transactions occurring on the trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain* unless divested of it by federal law or necessary implication of their dependent status. (emphasis supplied) *Id.* at 2080-81.

The sovereignty of the Apache tribes in New Mexico was recognized by officials of the United States who commenced negotiation of treaties with tribal chiefs the year after ratification of the Treaty of Guadalupe Hidalgo (February 2, 1848).[7] These actions are inconsis-

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See also F. Cohen, *Federal Indian Law*, 142 (U.N.M.ed.) which states:

> That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or Act of Congress is a proposition which has never been successfully disputed (footnote deleted).

and further that:

> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction. *Id.* at 143, *citing Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

[7] *See Jicarilla Apache Tribe* v. *United States*, 12 Ind. Cl. Comm. 439, 453 (1963), Finding 28. *See* Brief in Opposition to Petition for Certiorari of Respondent Jicarilla Apache Tribe, at 25-29. That Spanish officials also recognized the sovereignty of hunting tribes of Indians is confirmed in the treaty between Governor Anza

tent with Judge Seth's theory, also advanced by Petitioners, that "there were no vestiges preserved of any governmental powers in the Indian groups of New Mexico who did not occupy pueblos." *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 551 (1980), *reprinted in* J.A. 168.

This Court in *Colville* cited with approval *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), wherein the inherent tribal power to tax was first clearly upheld. In that case the Plaintiffs, who were traders doing business on town sites they had purchased within the boundaries of the Creek Nation, sought to enjoin officers of the Indian Nation and of the Interior Department from closing down their business and ousting them for nonpayment of Indian imposed taxes.

A 1902 statute had made it unlawful to remove or deport these persons from Indian territory. The Court of Appeals stated on page 950:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement

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of New Mexico and the Comanches in the Spanish-Comanche Peace Treaty of 1786. The Treaty was entitled "Articles of Peace Agreed Upon And Arranged In The Villa of Santa Fe And The Pueblo Of Pecos Between Colonel Don Juan Bautista de Anza, Governor of the Province of New Mexico, and the Comanche Captain, Ecueracapa, Commissioner-General of this Nation on the days 25th and 28th of February of 1786." A.B. Thomas, Forgotten Frontiers, 329 (1st ed., 1932).

> of the nation itself or by the superior power of the republic it is taken from it.

The Court went on to say that,

> . . . every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself. *Ibid.*

It is significant that the Plaintiffs in that case were purchasers of lots within the Creek Nation who therefore had valuable property interests, the value of which depended upon the ability of the owners to transact business on the premises. The case clearly holds that the taxes levied by the Creek Nation did not unlawfully impair Plaintiffs' property rights, nor were such taxes dependent on the power to exclude. The Court said:

> The conclusion necessarily follows that the prohibition of the deportation of noncitizens from the Indian Territory by the act of 1902 neither repealed nor annulled the permit laws of the tribes, nor deprived the Secretary of the Interior and the defendants of the authority to enforce them by preventing their violators from continuing their unlawful business after they had refused to pay the taxes. *Id.* at 957.

The Court continued:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business

> of those who violate them, and thereby preventing the continuance of that violation. *Id.* at 958.

Thus, the power to tax was upheld where there was no power in the Tribe to remove the taxpayer from the tribal jurisdiction.

In *Maxey* v. *Wright*, 54 S.W. 807 (1900), *aff'd.*, 105 F. 1003 (8th Cir. 1900), a license tax on attorneys practicing in Creek territory was upheld. Similarly, a tax levied by the Chickasaw Nation on cattle owned by non-Indians and grazed on private land within the tribal boundaries was upheld in *Morris* v. *Hitchcock*, 194 U.S. 384 (1904).

In the latter case this Court stated, referring to earlier Chickasaw legislation:

> The law in question seems to have a twofold object, — to prevent the intrusion of unauthorized persons into the territory of the Chickasaw Nation, and to raise revenue. 194 U.S. at 389, *citing* a report made to the Senate by a Committee on the Judiciary on February 3, 1879.

The first object was to impose a license or fee to be paid to the Tribe pursuant to the Tribe's power to exclude. The second object was to impose a tax levied to help support the Tribal government pursuant to the Tribe's inherent power to tax. The Court upheld both as proper. The Court also noted with approval a similar impost by the Cherokee Nation:

> And in the last-mentioned opinion it was, in substance, declared that, under §16 of the Curtis act, the Secretary of the Interior had authority to collect a tribal tax imposed by the laws of the Cherokee Nation of Indians upon the exportation of prairie hay from that nation, and that the tax was just as applicable to hay raised upon lands occupied by individual members of the nation, as their share

> of the public domain, pending allotments, as in any other case, and would be so even if the shipper was the absolute owner of the land on which the hay was raised. 194 U.S. at 392.

The Chickasaw tax, approved June 3, 1902, was *retroactively* applied to stock within Chickasaw territory "since January 1, 1902," thus the imposition of the tax was strikingly similar to the severance tax now in issue. *Id.* at 385 n.1.

This Court in *Colville* also relied on *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), in which non-Indians were taxed for the privilege of grazing cattle on land within the reservation. In affirming the power of the Tribe to levy the tax on non-residents, the Court in *Iron Crow* cited with approval F. Cohen's *Federal Indian Law (U.N.M.ed.), see* n.6 *supra,* and continued as follows:

> Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476.
>
> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists. *Iron Crow*, 231 F.2d at 99.

In *United States* v. *Mazurie*, 419 U.S. 544 (1975), this Court recognized the power, delegated by Congress, of the Wind River Tribes to regulate non-Indians doing business in "Indian country". The Court upheld a Wind River ordinance which required all retail liquor outlets within Indian country to obtain both tribal and state licenses, thus reaffirming the Tribe's sovereignty over its territory and power to license non-Indians.

In *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1958), the Court of Appeals, relying on *Iron Crow*, upheld a tax on nonresident lessees on tribal lands in the face of an assertion that the tax deprived the defendants of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States. This case supports the Tribe's contention and the Circuit Court decision below that Indian tribes may levy taxes on nonresidents with existing leases who could not legally be removed from tribal lands.

Petitioners also argue that tribal taxation is inconsistent with the Tribe's dependent status, relying on *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978), and *United States* v. *Wheeler*, 435 U.S. 313 (1978). This view of the concept of tribal dependence was rejected by this Court in *Colville* where it made clear that dependency was merely indicative of tribes' relationship to the federal government, but did not in itself restrict tribal sovereignty.

> Tribal powers are not implicitly divested by virtue of the Tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the Tribes seek to engage in foreign relations,

> alienate their land to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. *Colville*, 100 S.Ct. at 2081.

Only in the three specific circumstances mentioned has the exercise of tribal power been restricted in the past.

Wheeler, 435 U.S. at 323, rather than supporting Petitioners' arguments, outlines the proper framework within which to consider Indian sovereignty, consistent with the decision of the Court of Appeals here. The consideration is not what power Congress has granted to Indian tribes; the concern is what power Congress has removed. This Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status (*citing Oliphant*).

As pointed out by this Court in *Wheeler* and *Colville*, a divestiture of tribal sovereignty will only be considered in extreme circumstances where the United States Constitution mandates protection of U.S. citizens who are sought to be prosecuted in tribal courts; or the United States' trusteeship over Indians restricts alienation of their lands; or the sovereign interests of the National Government preclude the exercise of equivalent foreign treaty-making powers of tribes. *Wheeler*, 435 U.S. at 326; *Colville*, 100 S.Ct. at 2081.

In considering the imposition of a tribal tax on non-Indians in the *Colville* case, this Court stated that "we can see no overriding federal interest that would necessarily be frustrated by tribal taxation." *Colville*, 100 S.Ct. at 2081.

Petitioners and Amici also rely extensively on *Oliphant* as restrictive of tribal sovereignty to tax nonmembers doing business on the reservation. This case cannot be read so broadly as to invalidate the tax in question in this case.

Oliphant involved the exercise of *criminal* jurisdiction over a nonmember of the Tribe and did not involve a tribe's sovereign taxing power. The Court explicitly limited its holding by stating "[t]he case before us is concerned only with the criminal jurisdiction of tribal courts." *Oliphant,* 435 U.S. at 196 n.7. The Court stated that "[t]he history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress." *Id.* at 197 n.8.

The rationale of *Oliphant* does not support the conclusion that Indian tribes do not have civil and taxing jurisdiction over non-Indians transacting business on the reservation. As stated by this Court in *Colville*:

> Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activities. [*citing, Buster* v. *Wright, Iron Crow* v. *Oglala Sioux Tribe*, and *Morris* v. *Hitchcock*]. In these respects, the present cases differ sharply from *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which we stressed the shared assumptions of the Executive, Judicial and Legislative Departments that Indian tribes could not exercise criminal jurisdiction over non-Indians. 100 S.Ct. at 2081.

Petitioners also argue that the tax in this case is distinguishable from the taxes approved by this Court in *Colville*, first, because it is levied on production pursuant to leases which have been granted to Petitioners on specified terms which they argue cannot be changed without their consent; and second, because the Tribe as a property owner has no right to change the conditions of Petitioners' contracts on the Reservation. The Court of Appeals disposed of this argument as follows:

> The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. *But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues.* It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." *Merrion* v. *Jicarilla Apache Tribe*, 617 F.2d 537, 549 (10th Cir. 1980), *reprinted in* J.A. 161 (emphasis added).

Thus, if the Tribe's power to tax is recognized, this argument fails.

The cases cited by Petitioners, *Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942) and *Murray* v. *Charleston*, 96 U.S. (6 Otto.) 432 (1878) are not on point. They hold that a special tax may not be levied for the purpose of relieving a government of its indebtedness (*Murray*) nor can special assessments be imposed for maintenance and operation where earlier contracts had exempted the Respondents from contributing to such costs (*Puerto Rico*). This Court in *Wells* v. *Savannah*,

181 U.S. 531 (1901) and again in *Puerto Rico* made clear that general taxes for the support of government could only be avoided by clear proof of a valid contract of exemption from such payments. *See also Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514 (1830); *New York City Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938). The Jicarilla Apache Tribe never exempted Petitioners or waived its power to tax either expressly or impliedly.

B. *The Tribe's Power To Tax Is Directly Reaffirmed By The Indian Reorganization Act.*

The Constitution of the Tribe adopted pursuant to the Indian Reorganization Act and approved by the Secretary of Interior expressly provides for taxation of non-Indians doing business on the reservation (Art. XI, Sec. 1(e); *see* p. 4 *supra*). The Indian Reorganization Act of 1934 was a statement of a new policy toward Indian tribes. The Indian Allotment Act had failed. Indians were not being assimilated into the "white culture" and were dissatisfied with government services and with their inability to control their own affairs. *See* Hearing before the Committee on Indian Affairs, February 27, 1934, United States Senate, S.B. 2755.

The purpose of the Act is stated on its face:

> A Bill to grant Indians living under Federal tutelage the freedom to organize for *purposes of local self-government* and economic enterprise . . . to *conserve* and develop Indian lands. . . . (emphasis added)

Section 16 of the Act was intended to reinforce existing tribal powers and to strengthen tribes as govern-

mental units. An opinion of Solicitor Marigold of the Interior Department stated in 1934:

> My opinion has been requested on the question of what powers may be secured to an Indian tribe and incorporated in its constitution and by-laws by virtue of the following phrase, contained in section 16 of the Wheeler-Howard Act (48 Stat. 984, 987):. . . . In addition to all powers vested in any Indian tribe or tribal counsel by existing law, . . . the constitution adopted by said tribe shall also vest. . . . (55 I.D. 14, 17).

Solicitor Marigold concluded:

> I conclude that under Section 16 of the Wheeler-Howard Act (48 Stat. 984) the "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
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> * * *
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> 5. To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders. (*Id.* at 65-66).

This Solicitor's Opinion written in the year the legislation was passed is the best available indication of Congressional intent. *See Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956). Congress, in the 43 years since its adoption, has taken no steps to amend the Act to limit tribal powers as defined by Solicitor Marigold. Thus the administrative interpretation of the Indian Reorganization Act expressed by the Solicitor, must be deemed to have been accepted by Congress.

The view is supported by this Court in *Colville*, as follows:

> To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by §16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. §476. 100 S.Ct. at 2081.

It is submitted that the Court of Appeals was correct in finding no essential difference between the privilege tax here levied and those approved by the Eighth Circuit in *Barta* v. *Oglala Sioux Tribe* and *Iron Crow* v. *Oglala Sioux Tribe*, and by this Court in *Morris* v. *Hitchcock* and *Colville*.

ARGUMENT II

Power Of The Jicarilla Apache Tribe To Impose This Severance Tax Has Not Been Divested

A. *The Doctrine of Preemption Applies Only To Taxation or Regulation By States, Not Indian Tribes.*

Merrion and Bayless Petitioners and Amici oil companies erroneously apply the doctrine of federal preemption to the Tribe's taxing authority but cite no relevant cases in support of their arguments. This Court has only applied the doctrine in cases questioning the authority of *states* to tax or regulate activities on Indian reservations.[8]

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[8] *See, Central Machinery* v. *Arizona State Tax Commission*, _____ U.S. _____, 100 S.Ct. 2592, 2596 (1980); *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 100 S.Ct. 2578, 2588 (1980); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S.

There are no cases in which this Court or any lower federal court has applied the doctrine of preemption to such activities by Indian tribes on reservation lands.

The federal preemption standard as applied to states has it origins in the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl.2). In general terms, if the federal government has acted to "occupy the field" a state's activity in the same field may be restricted under the preemption standard.[9] Specifically concerning state activities on Indian lands, this Court stated in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 172 (1973):

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. (footnote and citation omitted) The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to applicable treaties and statutes which define the limits of state power.[10]

164, 172 (1973); *Moe* v. *Salish and Kootenai Tribes*, 425 U.S 463 (1976); *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 689 (1965); *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 (1976); *Antoine* v. *Washington*, 420 U.S. 194, 204 (1975).

[9] *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *DeCanas* v. *Bica*, 424 U.S. 351, 355-56 (1976); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 501-02 (1955); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[10] Footnote 7 of this Court's opinion in *McClanahan* v. *Arizona*, 411 U.S. at 171, identifies federal authority over Indian matters as the Commerce Clause while footnote 17 of *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. at 481, states that the basis for invalidating state taxing measures found inconsistent with federal law is the Supremacy Clause.

On the other hand, when reveiwing the nature and extent of tribal regulatory or tax authority, this Court has relied upon the basic legal concept of inherent tribal sovereignty. As recently stated by this Court in *White Mountain Apache Tribe* v. *Bracker*, _____ U.S. _____, 100 S.Ct. 2578, 2583 (1980):

> The unique historical origins or [sic] tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law.

The judicial standard applied in defining the exterior boundaries of tribal sovereignty is Congress' plenary power to regulate Indian affairs which has its roots in the Commerce Clause of the United States Constitution (U.S. Const., art. I, §8, cl.3).[11] This Court has then looked to determine whether Congress has affirmatively acted to specifically divest or limit a tribal government's sovereignty. As framed by this Court in *Washington* v. *Colville*, 100 S.Ct. at 2080-81:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by

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[11] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States* v. *Kagama*, 118 U.S. 375 (1886); *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975).

federal law or necessary implication of their dependent status.

The Court also stated:

> While the Tribes have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. *Id.* at 2083.

It is therefore submitted that there is no legal theory supported by precedent upholding the argument that Congress in enacting either the 1927 or 1938 Leasing Act has preempted Indian tribal taxation. The correct question to be entertained by this Court is whether Congress in its exercise of its plenary power over Indian affairs has acted to divest the Jicarilla Apache Tribe's authority to tax non-Indian lessees on the reservation for the privilege of extracting the Tribe's valuable non-renewable resources.[12]

B. *Any Divestiture of Inherent Tribal Sovereignty Must Be Expressly Legislated By Congress.*

Respondents have established the inherent sovereign authority of Indian tribes to tax mineral resource development on their lands (*See* Argument I, *supra*). This inherent authority need not be confirmed by Con-

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[12] *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra; Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); *United States* v. *Wheeler*, 435 U.S. 313 (1978).

gress; it exists as part of the inherent sovereign power of the tribe, unless and until that sovereign right is expressly limited or divested by Congress. It is well settled that divestiture of Indian sovereign rights will not be lightly inferred but will only occur where Congress has explicitly and unambiguously manifested an intention so to limit them.

Moreover, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, 100 S.Ct. at 2583-84. An example of this policy interpreting statutes in such a manner is that "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their predjudice." *Antoine* v. *Washington*, 420 U.S. 194, 199 (1975); *see also Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) and *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912).

A more recent example of judicial reluctance to interpret ambiguous congressional acts to the detriment of tribal sovereignty is this Court's decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In that case the question presented was whether an action could be maintained against a tribal officer in federal court to enforce a restriction upon tribal governments imposed by Title I of the Indian Civil Rights Act, 25 U.S.C §§1301-1303 (1976). While the Act imposed a number of statutory limitations upon tribal governments, it provided only one express remedy, the *writ of habeas corpus* in federal court to test the legality of a detention, which was not an appropriate remedy for the plaintiff in *Santa Clara*.

While noting that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess", the Court also observed that it has "frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms." *Santa Clara*, 436 U.S. at 56, 61. Nonetheless, the Court stated that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." (*Id.* at 60). This Court found competing purposes in the Indian Civil Rights Act — both the "objective of strengthening the position of individual tribal members vis-a-vis the tribe," and the objective of promoting "the well-established federal 'policy of furthering Indian self-development' " — and therefore refused to imply a cause of action (*Id.* at 62).

Where the sovereign powers of an Indian tribe may be affected, this Court has required absolutely clear indications of Congressional intent before it will intrude upon tribal autonomy. *See, e.g., Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

The case of *Bryan* v. *Itasca County*, 426 U.S. 373 (1976) presented a question almost identical to that raised by the Petitioners in the case at hand (Amoco Br. at 16-23); that is, does a general statute granting civil jurisdiction to states over non-Indians on reservation lands divest a tribe of an important attribute of sovereignty, in that case sovereign immunity from taxation? In *Bryan*, a Minnesota county sought to tax unrestricted property of a reservation Indian. Congress had enacted Public Law 280, a statute that by its express terms broadens state jurisdiction over matters in Indian

country subject to the Act. *See* 18 U.S.C. §1162; 25 U.S.C. §§1321-1326; 28 U.S.C. §1360. The statute provides that state "civil laws . . . of general application to private persons or private property" shall aply to those areas of Indian country subject to the Act. 25 U.S.C. §1322; 28 U.S.C. §1360. The Act expressly excepts from this application state taxation of trust or restricted Indian property. 25 U.S.C. §1322(b); 28 U.S.C. §1360(b). Minnesota claimed that its property tax law was a civil law of general application and that the express exception of the right to tax trust or restricted Indian property implied the right to tax unrestricted property.

This Court rejected both arguments, pointing out that the statute "does not in terms" authorize state taxation of anything. *Bryan,* 426 U.S. at 378. The Court applied the "eminently sound and vital canon" that ambiguities in Indian legislation are to be construed in the Indians' favor. *Id.* at 392. Furthermore, the Court declared that "[t]his principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Ibid.* Finally, the Court concluded that:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intent to terminate. . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (*Id.* at 393, *citing Mattz* v. *Arnett*, 412 U.S. 481 (1973)).

In the case at hand, Petitioners assert that the 1927 Leasing Act, which authorized states to levy taxes upon non-Indian lessees, divests the tribe of its sovereign

powers to tax. Under the rule in *Bryan*, this cannot be inferred in the absence of express statutory language.

C. *The Jicarilla Apache Tribal Leases Were Issued Under the 1938 Leasing Act And Therefore The Statutory Authority of States To Tax Under The 1927 Leasing Act is Irrelevant.*

All of the leases in this case were issued pursuant to the Act of May 11, 1938, 25 U.S.C. §§396a-396g. The lease attached to the Amoco Complaint (J.A. 64-66) provided in the "Forest and Land Protection Stipulations," which were an integral part of all leases, as follows:

> The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lease [sic] hereby agrees: . . . .

See also, certificate of Harold TeCube, the Jicarilla Agency Realty Officer, Bureau of Indian Affairs, filed with the Tribe's Motion for Leave to Amend Answer (J.A. 122).

Unlike the acts of 1919 through 1927 discussed below, the 1938 Act applies to all categories of Indian reservations in all states, excepting two reservations and two former reservations named in 25 U.S.C. §396f. Unlike the 1924 and 1927 Acts, the 1938 Act does not consent to state taxation. The Act applies to all leases entered into "On and after May 11, 1938" of unallotted reservation lands. 25 U.S.C. §396a.

Petitioners have argued that the tax consent in the 1927 Act (25 U.S.C. §398c) should apply to leases made under the 1938 Act. Based on the history of the comprehensive 1938 Act, this argument should be rejected.

Prior to 1938, Congressional enactments in 1916, 1919, 1920 and 1924 left the law relating to the leasing of tribal lands for mining purposes in a "patch-work state." F. Cohen, *Federal Indian Law, supra*, at 328. Acknowledging the confusion in the various Indian Leasing Acts, the Acting Secretary of Interior, Charles West, on June 17, 1937, transmitted to the House and Senate, a proposed comprehensive bill to govern the leasing of Indian lands for oil and gas and other minerals. *See* H.R. Rep. No. 1872, 75th Cong. 3rd Sess. (1937). The Acting Secretary stated on page 3 of the Report:

> The attached draft of bill, it is believed would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral leasing matters in harmony with the Indian Reorganization Act, and I recommend that it be enacted.

As to the patchwork state, Cohen stated: "[t]his condition was remedied on May 11, 1938, by the enactment of comprehensive legislation governing the leasing of tribal lands for mining purposes." F. Cohen, *supra*, at 328.

Section 1 of the 1938 Act, 25 U.S.C. §396a, provides for leasing of tribal lands for oil, gas or mining purposes "by authority of the tribal council or other authorized spokesmen for such Indians". Section 2 of the Act, §396b, provides for sale at public auction under terms and conditions prescribed by the Secretary and includes a further important addition as follows:

> *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes *as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 475, 476-478 and 479 of this title.* (emphasis added).

Section 7 of the 1938 Act includes an express provision that: "All Acts or parts of Acts inconsistent herewith are hereby repealed." (Section 7 is uncodified but is set out in Historical Note after 25 U.S.C. §396a). This clause was surely intended to repeal the hodgepodge of prior leasing acts.[13]

The current federal regulations governing leases of tribal lands for mining (including oil and gas), 25 C.F.R. Part 171, refer only to the 1938 Act and the Indian Reorganization Act as statutory authority for the regulations. The 1927 Act is not cited.[14]

Petitioners assert that the tax provision alone of the 1927 Act should survive, but as indicated below, that provision was an integral part of the 1927 leasing authority, and its retention is inconsistent with the purposes of the 1938 Act. Also, there is a more specific inconsistency. The 1927 Act provided for the deposit of royalties in the Treasury to the credit of the Tribe, and for payment of the state tax out of such tribal deposits. 25 U.S.C. §§398b, 398c. The 1938 Act, however, allows payment of royalties directly to the tribes.

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[13] The repealer clause did not immediately eliminate the prior laws. The 1938 Act applies only to all leases entered "On and after May 11, 1938." 25 U.S.C. §396a. The prior statutes continued to govern leases made under them so long as production continued.

[14] The headnote following the Table of Contents of 25 C.F.R. Part 171 states:

> AUTHORITY: Secs. 16, 17, 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4, 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250; 48 U.S.C. 358a, 362, unless otherwise noted. SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted.

Consistent with that provision of the 1938 Act, paragraph 3(c) of the Standard Lease Form dated November, 1947, attached to both the Amoco and Merrion and Bayless Complaints, provides that all rental and royalty payments, except as provided in Section 4(c) (royalty in kind), "shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day check or draft is issued, to the order of the treasurer of said tribe or the superintendent." (J.A. 25). A footnote to Section 3(c) specifies that payment is made to the superintendent only where the Tribe concerned is not organized under the Indian Reorganization Act (*Ibid.*).

The Constitution of the Jicarilla Apache Tribe provides that the Tribal Council is responsible for management of all funds within the control of the Tribe and may appropriate available tribal money for public purposes. (D. Ex.B; R. IV, 99-100, Res. App. E at 28) Thus, since rentals and royalties are paid directly to the Tribe and not deposited in the United States Treasury, there is no money with which to pay state taxes imposed on Indian royalties pursuant to the provisions of the 1927 Act. This is clear from the proviso of that section that "such taxes shall not become a lien or charge of any kind against the land or other property of such Indians." 25 U.S.C. §398c. Indian royalties or other interests in production under 1938 Act leases are thus not subject to state taxation.

The emphasis of the 1938 Act was to provide for issuance of oil and gas leases by the tribes. There was

neither a requirement that the monies generated by royalties be paid into the U.S. Treasury nor authorization for taxation by the states of production from lands leased under the Act. These factors, along with the express repeal of all inconsistent statutes, combine to destroy Petitioners' argument that the states have exclusive power to impose taxes upon the severance of oil and gas from the reservation. State power to tax non-Indian interests in production, if it exists, is grounded in common law.[15]

D. *The 1927 Leasing Act And Its Legislative History Is Devoid of Any Indication That Congress Intended To Divest Tribal Taxing Authority.*

The 1927 Leasing Act was one of several in less than a decade to authorize state taxation of private mineral development activities on federal and Indian lands. The state taxing provision which had appeared in previous acts became a kind of legislative boilerplate that appeared every time Congresss legislated on the subject of federal leasing policy. The legislative history shows that by 1927 state taxation was widely accepted by Congress and rarely debated.

Although the 1927 Act makes no explicit reference to severance taxation by the tribes, Amoco and Merrion Petitioners argue that Congress implicitly intended to divest tribal taxation as part of a unique legislative compromise necessary to secure passage of the Act. Peti-

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[15] *See Moe* v. *Salish and Kootenai Tribes, supra*; and *Washington* v. *Colville, supra*; the question of whether the states have common law authority to tax non-Indian lessees on the reservation is not an issue in this case.

tioners assert that a congressional power bloc wanted to deny the tribes any royalty rights in Executive Order reservations on the grounds that Tribes had no proprietary rights in such reservations, and the state tax provision was the necessary trade-off to recognize the tribes' royalty rights (M&B Br. at 31; Amoco Br. at 20-21).

This claim is incorrect for two basic reasons. First, the 1927 Act is anything but unique, since it accorded Executive Order tribes the same royalty rights as treaty tribes. Second, the legislative history shows that at no time did more than a handful of Congressmen advocate the anti-Indian position described by Petitioners. Congressional sentiment was overwhelmingly in favor of recognizing tribal royalty rights in Executive Order reservations, and there was never any compromise based on this point.

Prior to congressional enactments providing for state taxation of leasing activity on federal and Indian lands, state efforts to tax lessees' interests in production were rejected through the application of the "federal instrumentality" doctrine.[16] In 1915 Congress considered but failed to enact a leasing bill that appears to have provided the first general authorization for state taxation of leasing activity on federal lands.[17] This law included a provision disclaiming any intent to preclude state taxing jurisdiction. Indian leasing legislation containing a

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[16] *Choctaw, Oklahoma and Gulf Railroad Co.* v. *Harrison*, 235 U.S. 292 (1914), *Howard* v. *Gipsy Oil Co.*, 247 U.S. 503 (1918) (per curiam), *Large Oil Co.* v. *Howard*, 248 U.S. 549 (1919) (per curiam), *overruled in Oklahoma Tax Commission* v. *Texas Co., 336 U.S. 342 (1949); Oklahoma Tax Commission* v. *Barnsdall Refineries*, 296 U.S. 521 (1936)

[17] 53 Cong. Rec. 1122 (1916).

similar state tax proviso was enacted in the Act of June 30, 1919, 25 U.S.C. §399 (1976). The state taxing provision of this Act was neither explained nor debated, but simply incorporated from earlier versions of the same measure.[18]

Subsequent to the passage of the 1919 Act, Congress enacted three laws regulating leasing on Indian lands, all of which contained state tax disclaimer provisions derived from the 1919 Act.[19]

In 1920 Congress enacted general leasing legislation which standardized all leasing activity on federal lands and provided for the establishment of a statutory standard for the disposition of rents and royalties from oil, gas and mineral leases. The state tax disclaimer was taken word for word from the final version of the 1919 Act and was neither altered nor discussed as the Bill progressed to the Senate and House and then was signed into law by President Wilson on February 25, 1920.[20] Under the royalty formula in Section 35 of the 1920 Act, a percentage of all royalty revenues derived from activities within a state were to be paid to that state while the remainder went to the federal government.[21]

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[18] H.R. Rep. No. 4, 66th Cong., 1st Sess., 1-5 (1919).

[19] Act of May 29, 1921, §26, 41 Stat. 1249 (1921); Act of March 3, 1921, §5, 41 Stat. 1250 (1921); Act of May 29, 1924, 25 U.S.C. §398 (1976).

[20] Mineral Leasing Act of 1920, §32, 41 Stat. 450 (1919), 30 U.S.C. §189 (1976).

[21] Mineral Leasing Act of 1920, §35, 41 Stat. 450 (1919), 30 U.S.C. §191 (1976). The royalty formula was modified in 1976. *See* Pub.L. 94-579, Title III, §317(a), 90 Stat. 2770 (1976), 30 U.S.C. §191 (1976).

Passage of the 1920 Act left an inadvertent hole in federal leasing law. Existing Indian leasing acts applied only to land "occupied by Indians who have bought and paid for the same" — language construed to include treaty and statute reservations only, thereby excluding reservations created by Executive Order.[22] Tribes on treaty reservations therefore were able to lease their mining rights and realize steady royalty income, but tribes on Executive Order reservations had no statutory authority to lease. This problem was compounded as the 1920 Act applied only to lands "owned by the United States"[23] and the immediate question was whether Congress intended that term to include Executive Order reservations; if so, then serious equitable problems arose with respect to application of the royalty formula to Executive Order reservations. That formula divided royalty revenues between the state and federal governments with 37 1/2% going to the former and 62 1/2% to the latter. Therefore, it allocated no royalties to tribes on Executive Order reservations.

Within weeks of the enactment of the 1920 Leasing Act a bill was introduced to extend the 1920 Act to "unallotted lands within Indian Reservations" which was endorsed by the then Secretary of the Interior.[24] The bill credited all royalties to the tribes and did not mention state taxation.

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[22] Act of February 28, 1891, 25 U.S.C. §397 (1976); *see British-American Oil Producing Co.*, v. *Board of Equalization*, 299 U.S. 159, 162 (1936).

[23] Mineral Leasing Act of 1920, §1, 41 Stat. 437 (1919), 30 U.S.C. §181 (1976).

[24] H.R. 13851, 66 Cong. 2nd Sess. (1920).

The Harding Administration and its Secretary of the Interior Albert B. Fall assumed office three months later. In a tacit repudiation of the Interior Department's prior position, Secretary Fall ruled in 1922 that Indian reservations created by Executive Order were lands "owned by the United States" within the purview of the 1920 Leasing Act and subject to the leasing provisions of that Act[25] thereby temporarily forestalling corrective legislation. Secretary Fall's opinion is the foundation of Petitioners' argument based on the 1927 Act (Amoco Br. at 19).

In 1923 the newly appointed Secretary of the Interior, Hubert Work, recommended the enactment of new legislation in a letter to the Chairman of the Senate Committee on Indian Affiars.[26] In 1924 a draft bill was introduced in the Senate which provided that the Secretary deposit all leasehold royalties in an interest bearing account to the credit of the leasing tribe.[27] There

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[25] E.M. Harrison, 49 L.D. 139 (June 9, 1922), *reprinted in Hearings on H.R. 9133 Before a Subcommittee of the House Committee on Indian Affairs*, 69th Cong., 1st Sess., 73-77 (1926). Secretary Fall's decision angered his subordinates of the Indian Bureau, who favored the enactment of remedial legislation on the grounds that leasing under the 1920 Act was unfair to tribal members and inconsistent with congressional intent. *Id.* at 20-21 (testimony of Charles H. Burke, Commissioner of Indian Affairs).

[26] S. Rep. No. 669, 68th Cong. 1st Sess., 1-2 (1924).

[27] The text of the bill appears at 66 Cong. Rec. 999 (1924). Senator Harreld, the bill's sponsor, succinctly explained the need for legislation: "Secretary Fall made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases." *Id.* at 998.

was no provision authorizing state taxation of lease related activities, features included in later drafts of the bill.

Other relevant events occurred in 1924. Attorney General Harlan F. Stone reversed Secretary Fall's decision, concluding that the 1920 Act did not apply to Executive Order Indian reservations. 34 Op. Atty. Gen. 171 (1924). Also, legislation was introduced to extend the mineral leasing authorization period of the 1891 statute (25 U.S.C. §397) for oil and gas leases from ten years to "ten years, and as much longer as oil and gas shall be found in paying quantities." The House Committee added a provision to this statute consenting to state taxation, which the Interior Department did not oppose. *See* H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924). The bill passed without controversy and is now codified at 25 U.S.C §398.

The Senate continued discussion of the new legislation recommended by Secretary Work. A companion bill was reported and passed by the House in 1925 which preserved the tribal royalty feature of the Senate bill and added a state taxing provision similar to those in the 1921 and 1924 Acts.[28] The state taxing provision was temporarily deleted but then restored in the version of the bill that passed the Senate during the next session of Congress. At the Senate hearings, there was intially an assumption that Indian tribes opposed the provision giving states the authority to tax.[29] The American Indian

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[28] H.R. Rep. No. 1254, 68th Cong., 2nd Sess. 3-4 (1925).

[29] See 66 Cong. Rec. 5433 (1925), attributing to the Senate the view that "it was improper to grant to the States the unlimited power to tax, because the power to tax is the power to destroy."

Defense Association, however, endorsed the state taxing provision and urged the adoption of the Act.[30] There was dissatisfaction with the royalty formulas contained in earlier versions of the legislation which provided that 62 1/2% of the royalty revenues to be allocated to Indian tribes while the state share was required to be spent on education and roads on the Indian reservations.[31] Therefore, the Senate discarded the entire royalty formula and it never reappeared.

Committees of both Houses reported out bills giving the tribes all royalities but authorizing state taxes (S. 4152, H.R. 9133), and one of these passed. *See* 67 Cong. Rec. 10912-25, 11379-96 (1926). It was vetoed by the President based on a provision, unrelated to the present controversy, trying to deal equitably with parties who had obtained leases under, or otherwise relied on, Secretary Fall's 1922 opinion before it was reversed by Attorney General Stone in 1924. 67 Cong. Rec. 12641 (1926).

In 1927 bills were introduced identical to the one passed in 1926 except for the provision dealing with the 1922-1924 claimants. *See* 68 Cong. Rec. 4580 (1927). These became 25 U.S.C §§398a-398e.

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[30] "[T]he American Indian Defense Association indorses the idea that these Executive order reservations and the treaty reservations should, from their oil, gas, and mineral output, yield a revenue to the States. So far as I know, on that issue also there will be no difference of opinion among the Indian welfare bodies and I know of no Indian who objects." *Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate on S.1722 and S.3159*, 69th Cong., 1st Sess., 68-69 (1926).

[31] 66th Cong. Rec. 5433 (1925). *See also Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate*, on S.1722 and S.3159, 69th Cong., 1st Sess., 2 (1926), and S.Rep. No. 768, 69th Cong., 1st Sess., 6 (1926).

Petitioners base their "compromise" argument on the royalty allocation provision adopted by the Senate in 1925 and abandoned in 1926. They equate this provision with Secretary Fall's 1922 opinion and argue that the Senate, like Fall, was denying the tribes any mineral royalty rights in Executive Order reservations. *See* Amoco Br. at 19. This is plainly incorrect. Secretary Fall's view gave the Indians nothing at all. The 1925-1926 apportionment provision gave the Indians the major share of the royalties as previously stated and required the state's royalty share be spent only for roads and education on Indian reservations.

Secretary Fall's view that the Indians should get no royalties never had significant support in Congress. No bill was introduced adopting it, and no committee endorsed it, much less either House. To be sure, it had a few advocates (generously quoted by Petitioners) such as Senator Bratton, who had succeeded Albert Fall as Senator from New Mexico. But he was "the only member of the committee who dissented" from the 1925 bill. 67 Cong. Rec. 10920 (1926). In 1927 he admitted that the sentiment in the Senate was "overwhelmingly in favor" of the bill that passed, treating Executive Order tribes the same as treaty tribes. 68 Cong. Rec. 2793 (1927).

Instead of the formula allocation, Congress adopted the provision giving the Indians all the royalities but authorizing state taxation on the same terms as the 1924 Act for treaty reservations (25 U.S.C. §398) and the 1921 and 1924 special Acts for particular reservations (none of which had been set aside by Executive Order). *See* note 19 *supra*. Rather than representing a unique compromise, the statute was fully consistent with the objectives of leasing statutes from 1916 on, and as a result

treated Executive Order reservations the same as treaty reservations.

This history and the statutory language demonstrate that the 1927 Act was not unique, nor was it based on any compromise that derogates governmental powers of tribes over their reservations. The Executive Order tribes, and the treaty tribes under the 1921 and 1924 Acts, had mineral production on their reservations subjected to state taxes in identical terms. None of these laws adverted to tribal governmental powers.

In the absence of any indication that Congress intended to divest the tribes of any attributes of inherent sovereignty, it cannot now be assumed, over fifty years later, that Congress did so intend. As previously established, divestiture of inherent attributes of sovereignty may not be lightly inferred. Congressional intent to divest "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history". *Bryan*, 426 U.S. at 393.

Petitioners have failed to demonstrate that Congress by enacting either the comprehensive 1938 Leasing Act or the 1927 Leasing Act intended to preclude Indian tribes from exercising their inherent authority to tax mineral development activities on reservations.

E. *The Objective of the Mineral Leasing Act Regulations is to Protect Tribal Interests.*

Petitioners argue that Congress has preempted the field of taxation of oil and gas on Executive Order Indian reservations by enacting 25 U.S.C. §398(c) and as the result of adoption by the Secretary of Interior of a total federal regulatory scheme (M&B Br. at 29-35).

In the first place, 25 U.S.C. §398(c) is not relevant to these leases, and secondly, the regulations referred to by Petitioners were adopted pursuant to the authority of the 1938 Act (*see* p. 33 n.14 *supra*). The 1938 Act carried out the objectives of the Indian Reorganization Act, which were to promote tribal economic development and to ensure tribal control over disposition of reservation lands and resources. Section 16 of that Act provided that the Constitution adopted by a tribe should vest in the tribe, among other rights and powers, the power to "prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments."

It is true that Section 4 of the 1938 Act, 25 U.S.C §396(d), provided that all operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands would be subject to the rules and regulations promulgated by the Secretary of the Interior; nevertheless, the Secretary recognized that tribes organized under the IRA should have the authority to adopt their own leasing and operating regulations. 25 C.F.R. §171.29 provides:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

This Section, first adopted on December 24, 1957, 22 Fed. Reg. 10588, is a further confirmation of congressional and Interior Department objectives that organized tribes, when able, should take over the management of oil and gas operations on their reservations.

Proposed amendments of 25 C.F.R. Part 171 were published in the Federal Register August 11, 1980. The purposes and scope of the amended regulations are set forth as follows:

> **§171.1 Purpose and scope.**
>
> (a) The regulations in this part govern contracts for the prospecting for and mining of Indian-owned minerals, other than oil, gas and coal. These regulations are intended to ensure that Indians desiring to have their mineral reserves developed receive, at least, fair market value for their ownership rights; to ensure at the same time that any adverse environmental or cultural impact on Indians, resulting from such development, is thoroughly considered and possibly minimized; and to allow *Indian mineral owners to enter into contracts which reserve to them the responsibility for overseeing the development of their mineral reserves*. 45 Fed. Reg. 53165 (emphasis added).

These regulations were not finalized on the date of writing of this brief. However, the authorization proposed for contracting by Indian mineral owners, reserving to them the responsibility for overseeing the development of their mineral reserves, clearly indicates an understanding on the part of the officials of the Department of Interior that the development of Indian resources is not to be confined within an inflexible leasing structure.

Many tribes in recent years have negotiated joint venture contracts and other development contracts other than leases. An October, 1975 publication of the Bureau

of Competition, Federal Trade Commission, entitled "Staff Report on Mineral Leasing on Indian Lands", noted that none of the technical requirements of the regulations were sacrosanct, citing 25 C.F.R. §1.2. *See* Report at 18. The report quoted a former Associate Solicitor for the Division of Indian Lands, Department of the Interior, as follows:

> In short, the Indians and the Department can be quite flexible in their approach to leasing. The regulations have been characterized as a 'rock bottom protection of Indians and the Bureau of Indian Affairs against scalping by mining company officials'. *Ibid.*

This report emphasizes the correctness of the position of the tribes — that the regulations are intended to protect the tribes, not to prevent the tribes from exercising reasonable controls over development of their minerals.[32]

Petitioners' arguments that the comprehensive federal regulatory scheme precludes imposition of any

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[32] The Report stated in a section entitled "Flexibility of Indian Land Mineral Leasing Program", as follows:

> The primary characteristic of Indian land leasing is its inherent flexibility. The basic statutes governing leasing of Indian land, summarized above, are quite general, mandating few specific procedures to be followed. This contrasts dramatically with the far more detailed provisions of the Minerals Leasing Act of 1920, 30 U.S.C. §§181-237, which governs mineral leasing of public lands. The regulations pursuant to these Indian lands statutes, while significantly more technical than the statutes themselves, are also far less detailed than those pursuant to the Minerals Leasing Act, collected in 43 C.F.R. Parts 3100-3560. None of the technical requirements of the regulations, moreover, are sacrosanct. By 25 C.R.R. [sic] §1.2, the Secretary of the Interior "retains the power to waive or make exceptions to [these] regulations . . . in all cases permitted by law [where he] finds that such waiver or exception is in the best interest of the Indians."

additional burdens by the Tribe, particularly any unilateral increase in the rate of rental or royalty, ignore the major objective of the regulations, that is, to protect the Indian land owner. Petitioners take the language of *White Mountain Apache Tribe* v. *Bracker, supra,* and pervert the preemption doctrine to support their theory that the doctrine would be equally applicable to taxes that would reduce *Petitioners' profits*. No case has so held, nor has any case held that Petitioners are or should be protected against taxation by tribes, or against changes in the regulations other than changes in rentals or royalties. Paragraph 3g of the standard lease requires lessees to abide by and conform to any and all regulations of the Secretary of the Interior, now or hereafter enforced relative to such leases (except that changes in the rate of royalty or annual rental cannot be unilaterally changed). Section 171.29, adopted in 1957 (*see* p.44 *supra*), providing that the tribes could supersede the Secretary's regulations, gave Petitioners fair warning that they were subject to regulation both by the Secretary and the Tribe.

The Tribe concedes that, as a proprietor, it must comply with the provisions of the leases. However, as a sovereign government, the Tribe's power to tax, like that of a state, is limited only by constitutional provisions, law and regulations applicable to this aspect of sovereignty.

The power to tax is an attribute of sovereignty separate from the power to regulate. The power to regulate is not at issue in this case, because there is no claim or evidence in the record that the Tribe has made any attempt to exercise that power over Petitioners.

ARGUMENT III

The Jicarilla Apache Severance Tax Is Not Inconsistent With Any Interest Of The National Government Or National Energy Policy

The relevant national policy considerations raised in this case are those of tribal economic development and self-determination. Congress' policy to promote Indian economic development has been amply demonstrated. The Indian Financing Act of 1974, 25 U.S.C. §§1451 *et seq.*, states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources . . . comparable to that enjoyed by non-Indians in neighboring communities.

As well, the Indian Self-Determination and Education Assistance Act of 1974, 25 U.S.C. §450 *et seq.*, and the Indian Reorganization Act are clear examples of the congressional determination that tribes should more fully control their economic futures.

Even in face of these congressional policies Petitioners argue that the Jicarilla Apache severance tax undermines the long standing congressional policy favoring leasing and development of oil and gas reserves on Indian land "pursuant to uniform federal standards" and that the severance tax undermines the national interest in promoting the development of domestic oil and gas resources and curbing inflationary energy costs (Amoco Br. at 24-29; M&B Br. at 29-35).

It is questionable whether there is a viable or consistent national energy policy. A Department of Energy

study completed in July 1980 concludes that inconsistent government actions have nullified each other.[33] Tribal taxes on oil and gas production cannot impose a significant burden on operators or consumers since oil and gas production on Indian lands in the United States is an insignificant fraction of total United States production. Oil production on Indian lands in 1979 (23.8 million barrels) was less than 1% of total United States production of 3.1 billion barrels, and gas production on Indian lands in that year (118.3 billion MCF) was less than 1/10 of 1% of total United States production of 19.6 trillion MCF.[34]

Lessees on Indian lands engage in extensive operations including geophysical and seismic exploration, drilling of wells, laying of pipelines and cutting roadways which disturb the surface of reservation lands and have a significant impact upon the environment and economy of the reservation and the culture and daily lives of tribal members. The State of New Mexico does not regulate that activity, nor does it provide services designed to mitigate the impact of these operations. The United States Geological Survey shares the responsibility with the Bureau of Indian Affairs in performing environmental assessments, and supervising drilling and production operations. If there were in fact an inconsistency be-

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[33] *See* Energy Programs-Energy Markets, July, 1980, DOE-EIA-0201-16. This study is summarized by William D. Nordhaus, former member of President Carter's Council of Economic Advisors in an article in the New York Times entitled *Energy Policy — Mostly Sound and Fury*, Nov. 30, 1980, Financial Section, at 2.

[34] *Geological Survey, U.S. Dept. of Interior Federal and Indian Lands, Oil and Gas Production, Royalty Income and Related Statistics*, June 1980. Indian production at 73; total U.S. production at 383.

tween the Indian tribal policy of securing revenues to assist in supervising oil and gas operations and protecting the environment on the reservation, and a national policy of encouraging production of oil and gas, any such inconsistency must be considered in light of the express policy of the Congress in encouraging Indian self-determination and encouragement of strengthening of Indian tribal governments. Congress could not have intended tribes to support their governments by self taxation alone, leaving giant corporations to exploit tribal resources tax free.[35]

Congress moreover has expressly recognized Indian severances taxes in the Natural Gas Policy Act of 1978, wherein state severance taxes are defined to include taxes imposed on the production of natural gas by any state or Indian tribe (15 U.S.C. §3320). Producers are permitted to sell gas at a price in excess of the maximum lawful price to the extent necessary to recover state and Indian severance taxes, with certain limitations. *Ibid.* Since Congress has recognized Indian severance taxes in this most recent legislation, imposition of these taxes cannot be deemed to be inconsistent with any national policy.[36]

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[35] Neither the tribes nor individual tribal members can provide the tax base to support tribal governments. Contrast the low per capita and total income of Indians in the United States with the net earnings of five of the larger companies which are parties to this litigation shown in the Tribe's Brief in Opposition to Writ of Certiorari herein, p. 6 n.5.

[36] Recognition by the Congress of this case in the Tenth Circuit did not preclude the treatment of Indian severance taxes in the same manner as state imposed severance taxes. *See* Conference Report on the Natural Gas Policy Act of 1978, H.R.Rep. No. 95-1752, 95th Cong. 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Adm. News 8983.

ARGUMENT IV

The Tribal Severance Tax Levied Upon The Privilege Of Extracting Minerals On The Reservation In No Way Violates The Commerce Clause Of The United States Constitution

A. *The Tribal Severance Tax is Levied Upon Local Activity.*

The Jicarilla Apache severance tax is an excise or privilege tax on the local business of producing oil and gas on the Tribe's reservation measured by the volume of production at the wellhead. By the language of the tribal severance tax Ordinance, it is "imposed on any oil and natural gas severed, saved and removed from Tribal lands", that is, extracted from tribal soil (J.A. 38). It is levied on all crude oil, condensate and natural gas "produced" on the reservation (*Id.* at 39, paras. 2 and 3). The tax is paid by the operator of each well. Each operator is required to file a return showing the total volume of each well each calendar month (*Id.*, para. 6). The taxable event on which the tribal tax is imposed is the severing, saving and removal of oil and gas from reservation soil.

The Amoco Petitioners argue that the language "severed, saved and removed from Tribal lands" means that "the Jicarilla Ordinance in fact applies only to the shipment of goods *off* the Reservation, not the act of severance *on* the Reservation" (Amoco Br. at 37). This erroneous assertion is made even in the face of the express provisions of the Ordinance that the taxes are due at the time of severance (J.A. at 38, para. 1).

The State of New Mexico has enacted severance taxes on coal and uranium employing similar language. The severance tax on coal provides:

> The severance tax on coal is measured by the quantity of coal severed and saved. The taxable event is the sale, transportation out of New Mexico or consumption of the coal, whichever first occurs. Upon each short ton (two thousand pounds) of coal severed and saved there shall be imposed on the severer a severance tax of fifty-seven cents ($.57). N.M. Stat. Ann. §7-26-6 (1978).

The severance tax on uranium provides:

> The severance tax on uranium is measured by the quantity of U_3O_8 contained in and recoverable from severed and saved uranium-bearing material whether that material is ore or solution, measured in a standard manner established by regulation of the director of the revenue division of the taxation and revenue department. The taxable event is the sale, transportation out of New Mexico or consumption of the uranium-bearing material, whichever first occurs. N.M. Stat. Ann. §7-26-7 (1978).

Neither of these taxes has been challenged as imposing a prohibited tax on interstate commerce, nor have taxes using similar language been challenged in other states.[37]

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[37] The State of Arkansas levies a severance tax on natural gas at the rate of 5% of the market value *at time and point of severance.* Ark. Stat. Ann. §§84-2102(e) *et seq.* (1980). "Sever" means natural resources cut, mined, dredged or otherwise taken or *removed.* "Point of severance" is defined to mean the place on which transportation has been or is about to be commenced for their use or processing after being severed. "Time of severance" is defined to mean the date on which transportation has been or is about to be commenced for their use or processing after being severed. The Arkansas severance tax was upheld in *Floyd* v. *Miller Lumber Co.*, 160 Ark. 17, 254 S.W. 450 (1923).

Clearly the taxable event on which the tribal severance tax is imposed is the severing, saving and removing of oil and gas from reservation soil. The Courts have unanimously held that such production or mining of natural resources is a distinctly local event, occurring before the products move into interstate commerce. Taxes which are applied evenhandedly to such severance of gas or oil or production of minerals do not constitute an unconstitutional burden upon commerce. *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927); *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922); *see Alaska* v. *Arctic Maid*, 366 U.S. 199 (1961); *Dunbar-Stanley Studios, Inc.* v. *Alabama*, 393 U.S. 537, 541 (1969).

In *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. at 174-75, the State of Minnesota enacted a tax to subject all those " 'engaged in the business of mining or producing iron ore or other ores' within the state to the payment in each year of 'an occupation tax' equal to 6 percent of the value of ore mined or produced during the preceding year — such tax to be in 'addition to all other taxes.' " The statute directed that the tax be computed on the value of the ore at the place where it is " 'brought to the surface of the earth,' less certain deductions. . . ." *Id.* at 175. The law was attacked on the basis that it imposed a tax on mining which, although not actually a part of interstate commerce, was so closely connected therewith that to tax it was to burden or interfere with such commerce in violation of the Commerce Clause of the Constitution of the United States.

The taxpayers argued that since less than two percent of the iron ore mined by the taxpayers was consumed within the state and practically all of the output of

the mines was shipped to fill existing contracts with consumers out of state, there was a practical continuity of movement from the mining operation to the loading on cars for interstate shipment, which made the mining a part of interstate commerce. This Court responded to taxpayers' argument stating:

> Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation (citations omitted). Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce (citations omitted).
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> The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference. *Id.* at 178-79.

In *Hope Natural Gas Co.* v. *Hall*, the Supreme Court of Appeals of West Virginia had modified a lower court decree so as to permit Defendant state officers to impose and enforce a tax, "upon the natural gas produced by the plaintiff, based upon the value thereof within the state and before it enters interstate commerce. . . ." *Hope*, 274 U.S. at 287.

The Plaintiffs in Error owned 3,178 producing wells in twenty-five counties in West Virginia, most of which passed into interstate commerce by continuous movement from the wells. Counsel for Plaintiffs in Error admitted that, without violating the Commerce Clause, the

state could lay a privilege or occupation tax upon producers of natural gas measured according to value of the commodity at the well. They argued, however, that the statute as construed by the highest court of the state would subject the gross receipts derived from interstate commerce to the tax. The Court stated in dismissing the argument:

> The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, hereafter, executive officers disregard the approved construction and fix values upon any improper basis appropriate relief may be obtained through the courts. *Id.* at 288.

As was true of the tax in *Hope Natural Gas Co.* v. *Hall*, the volume of production on which the Jicarilla severance tax is measured and determined is at the wellhead, as provided by paragraph 6 of the Ordinance which requires producers to report the "total volume of oil, gas and condensate and BTU of gas produced from each well. . . ." (J.A. 39). Measurements must necessarily be taken at the wellhead because the gas is commingled with gas from other wells when taken into gathering lines. Crude oil is stored in holding tanks at the site of each well and hauled off from the well site in a tanker truck in which it may be commingled with oil from other wells.[38]

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[38] Petitioners' reliance on *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954) is misplaced. That case involved the imposition of a Texas tax on the occupation of "gathering gas" where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the state for the purpose of immediate interstate transmission. While the oil and gas severed from the reservation flows into interstate commerce, the tribal tax

B. *The Jicarilla Apache Tribal Severance Tax Does Not Discriminate Against Interstate Commerce.*

The District Court held that the Jicarilla Apache tax imposed discriminatory burdens on interstate commerce, and together with the various production taxes levied by New Mexico, a multiple burden on interstate commerce. This holding was rejected by the Court of Appeals. *Merrion*, 617 F.2d at 544-46, *reprinted in* J.A. 152-56.

The threshold question that must be answered, not addressed in the courts below, is whether the Indian Commerce Clause or the Interstate Commerce Clause of the Constitution (U.S. Const. art. I, §8, cl. 3) in themselves impose any implied restraints on actions of Indian tribes in light of the fact that Congress has not expressly legislated so to limit tribes.

The Commerce Clause provides: "Congress shall have the power . . . To regulate Commerce . . . with the Indian tribes; . . ." and constitutes a delegation by the states to the federal government of that power. It has as its primary purpose the protection of Indians from outside trade interference and alienation of their lands without the consent of Congress. *See* F. Cohen *supra* at 91, n.22, 348-49. Under the established doctrine of the plenary powers of Congress to regulate non-Indians engaged in commerce with tribes, Congress has affirmatively acted under the Indian Commerce Clause to assure protection of Indian commerce. *See* the Trade

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is upon the privilege of extracting oil and gas, and therefore, the *Michigan* case is inapplicable. As noted by the Court, Texas also levies on producers a tax of 5.72% of the value at the well of all gas produced in the state. *Id.* at 163.

and Intercourse Acts,[39] and the Mineral Leasing Acts, Argument II E, *supra*.

Restraints on tribal control over reservation trade, based on the Indian Commerce Clause, cannot be implied. It is therefore necessary to look for specific congressional acts to determine whether Congress has in any way acted to restrict the tribes' sovereign powers to tax. As discussed in Argument II above, Congress has not done so. Rather, Congress has acted to affirm tribes' power to regulate their own affairs, including taxation of their finite resources. *See* discussion of the Indian Reorganization Act, pp. 22-24 *supra*.

Moreover, the Court has never held that the Indian Commerce Clause or the Interstate Commerce Clause has limited the power of Indian tribes to regulate non-Indian business activity on reservations absent express congressional action. The tribal power to exclude non-Indians from tribal territory, incorrectly argued by Petitioners as the only basis for tribal taxing power, is inconsistent with a theory that the tribes cannot engage in activity which may restrict commerce originating on their reservations.

For these reasons it is submitted that Petitioners' arguments based on violations of the Interstate Commerce Clause of the Constitution are misplaced. Nevertheless, judging the Jicarilla Apache tax by criteria heretofore applied by this Court to similar state taxes on production of oil, gas and minerals, the tax must be upheld under the Commerce Clause of the Constitution.

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[39] For example, the Acts of July 22, 1790, 1 Stat. 137; March 30, 1902, 2 Stat. 139; June 30, 1834, c. 161, §12, 25 U.S.C. §177; July 31, 1882, 22 Stat. 179, 25 U.S.C. §264.

Respondents do not argue with Petitioner's statements and supporting cases that state taxes on activities related to interstate commerce must be fairly apportioned, must have a substantial nexus within the taxing state, cannot discriminate against interstate commerce, and must be fairly related to services provided.[40] However, Petitioners consistently fail to acknowledge that the New Mexico and tribal severance taxes are impositions upon local activities by two separate governmental units within whose territorial limits and under whose jurisdiction the activities take place. The nexus requirement of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), is clearly met. As to the relationship between the services and privileges provided and the burden of the tax, the Tribe attempted to demonstrate this relationship, but the evidence was rejected by the District Court upon Petitioners' objections. *See* p. 7-8 *supra*. For these reasons, Petitioners' challenge must be limited to their allegations of discrimination and multiple burden.

Paragraph 4 of the Ordinance exempts only "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe. . . ." (J.A. 39) Paragraphs 2 and 3 of the Ordinance provides for the rate of tax on oil and gas "produced on the Reservation and sold or transported off the Reservation." (*Id.*)

The Amoco Petitioners argue that the Oil and Gas Severance Tax Ordinance discriminates between products taken off the reservation and those utilized on it.

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[40] Theoretically, even if these standards were applied to Respondents' tax, the Court of Appeals analysis in its footnote 4 would be dispositive (J.A. 154).

Paragraphs 2 and 3, construed with the exemption in paragraph 4, were designed to ensure that all oil and gas not used by lessees in aid of production or used by the tribal government *for tribal purposes* would be subject to the tax. All oil and all gas, except pipeline production, is sold at the wellhead. Pipeline producers transport their production off the reservation without sale, hence, the necessity for the wording "transported off the reservation" in paragraph 2 and 3 of the Ordinance.[41] The language of the tax ordinance ensures the equal taxation of all oil and gas produced on the reservation, including pipeline production, exempting only that used by lessees in aid of production or used by the Tribe for tribal governmental purposes.[42]

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[41] Similar language is contained in the State of New Mexico's Resource Excise Tax Act. N.M. Stat. Ann. §§7-25-1 to -9. §7-25-3, paragraph I defines "taxable value" as the value of the product after severing. This section provides that:

> All natural resources severed or processed in New Mexico shall be included in determining taxable value, regardless of the place of sale or the fact that delivery may be made to points outside of New Mexico. If any person shall ship, transmit or transport natural resources out of New Mexico without making sale of them, or shall ship, transmit or transport natural resources out of New Mexico in an unfinished condition, the value of the natural resources in the condition in which they existed when shipped, transmitted or transported out of New Mexico and before they enter interstate commerce, without deduction of any land other than specified in this subsection, shall be the basis for determining the taxable value.

[42] The tribal tax also exempts oil and gas consumed by Petitioners in connection with production (J.A. 39). We do not understand Petitioners to base their claim of discrimination on this provision. This kind of exemption is a common feature of state laws, e.g., Mont. Stat. Ann. 15-36-101, 103 (1977).

This Court has specifically upheld this type of classification and exemption in *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165 (1932). In that case, this Court held that a tax levied by the State of Idaho on the generation of electricity was a tax on a process which was essentially local and the Commerce Clause of the Constitution did not prevent the state from exercising exclusive control over its manufacture. The tax in *Utah Power and Light*, provided an exemption for the benefit of consumers of electrical power for irrigation purposes on land within the state. The Court held that the irrigation of lands in that arid region was a matter of public concern and exemption of this character was not precluded by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Court further interpreted a clause which provided for levy of the tax on "all electrical energy generated or produced, within the state, for barter, sale or exchange" as follows:

> That is, to put the matter concretely, the amount of the initial production must first be ascertained by measurement at the place of production, and from that there must be taken amounts used by the producer or consumed in effecting transmission (including so-called line or system losses), or disposed of otherwise than by barter, sale or exchange — the remainder only being subject to the tax.
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> * * *
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> Neither the validity of the tax nor its certainty is affected because it may be necessary to ascertain, as an element in the computation, the amounts delivered in another jurisdiction. *Id.* at 190.

A similar reasonable interpretation of paragraphs 2 and 3 of the Jicarilla Apache Oil and Gas Severance Tax Ordinance leads to the conclusion that the limitation of

the tax to oil or gas "sold or transported off the reservation" is to deduct amounts "used by the producer or consumed in effecting transmission" as stated in *Utah Power and Light, supra*, in addition to the specific exemption in the Ordinance of royalty gas, oil or condensate taken by the Tribe in kind and used by the Tribe (meaning the tribal government, not tribal members; tribal members as individuals are subject to the tax).[43]

Finally, the provision exempting the Tribe from its own tax is supported by numerous decisions of this Court holding that the Interstate Commerce Clause does not limit the proprietory operations of the states themselves. *Reeves, Inc.* v. *Stake*, _____ U.S. _____, 100 S.Ct. 2271 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349 (1908); *McCready* v. *Virginia*, 94 U.S. 391 (1877). The rule of *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978), striking down a state statute establishing employment preferences for state residents, again has no application to Indian Commerce.

The Amoco Petitioners assert that the tribal severance tax on oil and gas is discriminatory in that it affects customers throughout the nation, and that since the Tribe has exempted itself from the tax, it will in some way gain a commercial advantage over business off

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[43] Although there is no exemption here for tribal members, *Utah Power and Light*, implies that an exemption for the benefit of tribal members would not be fatal to the tax. *See also*, the Indian Preference Acts, 25 U.S.C. §§44-47, 274, 472; *Morton* v. *Mancari*, 417 U.S. 535 (1974).

the reservation or outside the State of New Mexico. There is simply no evidence of discrimination in favor of local commerce. *See Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318, 329, 337 (1977); *Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959). This Court has shown reluctance to void local taxes based on theoretical preferences imagined by counsel. *See Mobil Oil Corp.* v. *Commissioner of Taxes*, _____ U.S. _____, 100 S.Ct. 1223, 1233 (1980).

The Petitioners also maintain that the tax is discriminatory in permitting the Tribe to resell its royalty share of production on the reservation, without incurring tax liability, and thereby foster the development of tribal subsidized industries on the reservation (Amoco Br. at 34). The supposed "competitive advantage over Petitioners and Petitioners' customers due to the existence of the discriminatory tax" (*Id.* at 34 n.44) is an absurdity. Because of the vintage pricing of natural gas under the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, 3311 *et seq.*, and the myriad of pricing regulations pertaining to oil distribution and sale, we submit that the arguments made with respect to possible competitive advantage of the Tribe, cannot be seriously considered.[44] If

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[44] Natural gas ceiling prices applicable to this production for the month of December, 1980, ranged from $.361 per million BTU (mm BTU) for certain Rocky Mountain gas, $2.64 per mm BTU for new natural gas, $2.826 per mm BTU for stripper gas, to $4.692 for gas from tight formations. Order of the Director, Office of Pipeline and Producer Regulation, Oct. 27, 1980, 45 Fed.Reg. 73027-32. With respect to the tax on oil, it is submitted that it would be impossible to determine the price advantage, assuming Indian production were exempt from tribal severance taxes on oil, in view of the tier pricing of oil. "Tier 1 oil" sold on an average price of $13.02 per barrel in May 1979. The base price for computation

there were resident local producers other than the Tribe itself, they plainly would be liable for the tax.

The arguments of the Amoco Petitioners that the Jicarilla tax is unrestrained by the economic and political pressures that normally serve to curb a severance taxing power are also unrealistic. The Tribe's tax would affect new production as well as old production and if unreasonable, would influence economic development of the reservation to the detriment of the Tribe. Moreover, tribal members themselves are subject to price increases which might occur as a result of the tax. These arguments, again, must be viewed in the light of the purposes of the Indian Commerce Clause and the control over tribes exercised by the Secretary of Interior.

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of windfall profit on Tier 2 oil is $15.20, and for Tier 3 oil, $16.55, all of these adjusted for inflation. Prices for imported oil in November, 1980, ranged from $20.79 to $37.15 per barrel. *Oil and Gas Journal*, Nov. 24, 1980, p. 208. The windfall profits tax varies from 70% of the windfall profit on Tier 1 oil and 60% on the windfall profit on Tier 2 oil for large producers, and 30% tax on the windfall profit on Tier 3 for large producers, and for small producers on all three Tiers. Crude Oil Windfall Profits Tax Act of 1980, §§4987, 4989, Pub.L.96-223. The Petitioners do not suggest how it is possible to measure the impact of the state or tribal severance taxes on this crazy price structure.

C. *The Tribal Severance Tax Does Not Impose A Prohibited Burden on Interstate Commerce.*

Petitioners claim, contrary to the holding of the Court of Appeals, that the tribal severance tax on oil and gas constitutes a prohibited multiple burden on interstate commerce based on the fact that both the Tribe and the State of New Mexico levy taxes on the production of oil and gas on the Jicarilla Apache Reservation.[45] The District Court adopted the proposed finding of Petitioners that the combined state and tribal tax burden would amount to more than 29% of the interstate price of old gas and over 12 1/2% of the price of old oil (J.A. 130, Finding 36). This finding was not substantiated by any evidence in the record as noted on p. 6 *supra*. The argument that the Jicarilla tax would adversely affect development and extraction of oil and gas and other minerals has no foundation of fact in the record or elsewhere.[46] *See* pp. 6-7 *supra*.

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[45] New Mexico imposes six separate taxes on oil and gas production or equipment: the Oil and Gas Severance Tax, N.M. Stat. Ann. 1978, §§7-29-1 to -22; the Oil and Gas Conservation Tax, §§7-30-1 to -26; the Oil and Gas Emergency School Tax, §§7-31-1 to -25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to -27; Natural Gas Processors Tax, §§7-33-1 to -22; and the Oil and Gas Production Equipment Ad Valorem Tax, §§7-34-1 to -20.

[46] The District Court's Finding No. 35 stated "that if the wells operated by Plaintiff cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe" (J.A. 130). This finding is meaningless because there was no evidence of probative value that wells would be operated unprofitably, and no evidence whatsoever that leases would be operated unprofitably. The leases provide for a term of 10 years and so long thereafter as oil and gas is produced in paying quanties "from said land", not from each *well* (J.A. pp. 22-23).

A detailed and comprehensive study of the impact of the tax on the consumer was made by Dr. Alfred L. Parker at the request of the Tribe (Res. App. A *supra*; *see* p. 4 *supra*). The study established that the tribal tax would increase the cost of gas to New Mexico consumers by only 6/10th of 1 cent per MCF (*Id.* at 16), and increase the cost to interstate consumers by 1/10 of 1 cent per MCF (Id. at 8). The report concluded that the impact on all consumers of oil and gas would be insignificant (Id. at 19-20).

Petitioners made no study of the impact of the tax on interstate or intrastate consumers. As noted in Respondents' Statement of the Case, p. 6, *supra*, Petitioners' witness Dugan testified that the total burden of the State of New Mexico and the Jicarilla proposed tax would be 20.4% of the price of old gas (R.IV, 58). No credible evidence was offered by Petitioners as to burden of the tax on producers, or on consumer prices. The tax is only one component of all elements included in the cost of service of gas (R.VI, 290).

Since Petitioners failed to translate the "burden" on wellhead price to "burden" on the consumer, represented by the price paid by the consumer, relying on the rejected *per se* rule of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951) (*see Merrion*, 617 F.2d at 545 n. 4, *reprinted in* J.A. 154 n.4), the lessees failed to build a factual foundation in the record to challenge the tax on the basis of excessive burden unrelated to services performed on the reservation (*see also* pp. 7-8, *supra*).

The argument that the tax may limit production by imposing undue burdens on producers becomes absurb when viewed in the perspective of the impact of the tax imposed under the Crude Oil Windfall Profits Act of

1980, Pub. L. 96-233, 94 Stat. 229. The stated objective of that Act is to generate $227.3 billion in tax revenue over the period the tax is in effect, from March 1, 1980 until the completion of a 33-month phase-out of the tax, the phase-out to begin not later than January 1991.[47]

There is no constitutional prohibition against multiple taxation of local activity. It "was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938). Prohibited taxes are those which are disproportionately imposed after products begin to move in interstate commerce by every state through which the products move. *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964).

The fact of the matter is that the Respondents' severance tax on oil and gas taxes is imposed upon a local activity. The additional fact that the State of New Mexico taxes the same local activity under its laws does not create a prohibited multiple burden on Petitioners.

The cases relied on by Petitioners involve multiple burdens imposed by different jurisdictions at geographically separate points in the flow of commerce.

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[47] Despite the impact of the Crude Oil Windfall Profits Tax which was effective March 1, 1980, the drilling of oil and gas wells during 1980 was the highest that it has ever been. The Oil and Gas Journal of January 9, 1981 reported that the number of rotary rigs active each week during the year in the United States averaged 2910, 224 more than the average during the previous record years, 1955. The 1980 average was 728 rigs more than the average for 1979 and climbed steadily throughout the year 1980 (*Journal*, at 24).

Here the tribal tax and state taxes are based on concurrent jurisdiction over the same situs, the Jicarilla Reservation. The Court expressly recognized that such taxes do not impose a prohibited burden in *Washington* v. *Colville*, 100 S.Ct. at 2084:

> There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.

Every process taking place prior to sale or transportation in interstate commerce is a local transaction and may be subjected to a variety of local taxes. *See Chassaniol* v. *Greenwood*, 291 U.S. 584 (1934); *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17 (1934). A state license tax on operation of a cotton compress was upheld in *Federal Compress*; a city tax on persons selling the same cotton was upheld in *Chassaniol.*

In *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the Court of Appeals upheld the County's possessory interest tax on non-Indian lessees of land held in trust by government for the Fort Majove Indian Tribe. The Fort Mojave Tribe also imposed its own possessory interest tax. The Court responded to the Tribe's argument that the imposition of a possessory interest tax by both the County of San Bernardino and the Fort Mojave Tribe would constitute prohibited multiple taxation by stating:

> There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The Tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. *Id.* at 1258.

There is thus no constitutional ban upon the imposition of non-discriminatory local taxes by two taxing authorities having jurisdiction; double taxation is a fact of modern life. *Colville*, 100 S.Ct. at 2084.

ARGUMENT V
The Oil Companies' Rights Are Fully Protected

The argument of Petitioners that indulgence of governmental sovereignty by Indian Tribes would effectively create foreign enclaves within the states governed by a privileged class who accept benefits without burdens of citizenship and who are unconstrained by the fundamental precepts of American law and thus free to "exploit, expropriate and expel other Americans" (M&B Br. at 37), is specious and irrelevant to this case.

Petitioners cite not one instance of expropriation or expulsion by Indians or Indian governments, nor do they cite one instance of deprivation of their property without due process of law or any action taken by individual Indians or Indian tribes which would impair the obligation of their contracts.

Petitioners rely on the sanctity of the their leases; nevertheless, at trial when the Tribe sought to introduce evidence of nonperformance of their contracts, they objected and the Court denied admission of evidence offered to establish that the Petitioners had come to Court with unclean hands. Counsel for Merrion and Bayless stated "I think all the other equitable issues don't have any relation if the tax is valid." (R.VI, 194). Counsel for the Tribe argued that if the Court were going to continue the temporary injunction or issue a permanent injunction, then the question of clean hands was relevant (*Id.* at 194-95).

The District Court denied admission of testimony and affidavits which would have established substantial breaches and non-performance by Defendents of their lease contracts (D. Exs. AA & BB, R.VI, 306-07; Ex. BB appeared as Ex. B to Defendent's Brief on Motion for Rehearing, R.I, 201-04).[48] Petitioners should not now be heard in their complaints of possible impairment of the obligation of their contracts.

If tribal actions were taken in the future to jeopardize the property rights of these lessees on the reservation, new questions would arise, not relevant to this case. *See Hope Natural Gas Co.* v. *Hall, quotation at* p. 55 *supra*. The forum granted to Petitioners herein is proof that remedies are available for adjudication of any grievances Petitioners may have pertinent to the issues in this case. The Circuit Court of Appeals held that "the Tribal Council, a duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance (J.A. 42, para. 13), expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court." *Merrion*, 617 F.2d at 540, *reprinted in* J.A. 144-55.

The argument that persons should not be subjected to occupation or license taxes without the right to participate in the government imposing such taxes is one that has long since been settled adversely to Petitioners. The Circuit Court of Appeals of the Eight Circuit in *Barta* v. *Oglala Sioux Tribe*, 259 F.2d at 557, in discussing a license tax levied by the Oglala Sioux Tribe for

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[48] *See also Jicarilla Apache Tribe* v. *Supron Energy Corp.*,479 F. Supp. 536 (D.C.N.M. 1979)), where the Court held that the Secretary of Interior had breached his fiduciary obligation to the Tribe with respect to requiring diligent development of leases, offset drilling, and required additional royalty accounting pursuant to the terms of the leases.

grazing and farming on tribal lands by nonmembers of the Tribe, stated as follows:

> It is finally argued that the tax is violative of defendants' rights in that it constitutes taxation without representation. If it be conceded that the act of the tribe in levying this tax constitutes taxation without representation that alone is certainly not fatal. The taxability of property is not dependent upon the residence of the owner of the property. The property rights of an alien or nonresident are taxable the same as the property of residents who may be said to have representation. *Citing Thomas* v. *Gay*, 169 U.S. 264 (1898).

See also Hagar v. *Reclamation District*, 111 U.S. 701, 709 (1884).

Furthermore, any action of the Tribal Council of the Tribe in changing the existing Severance Tax Ordinance would be subject to Secretarial approval, and to judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706.

Finally, and perhaps most importantly, the Congress of the United States to which Petitioners have full access exercises plenary power over Indian affairs.

Conclusion

For the foregoing reasons, the Opinion of the Court of Appeals for the Tenth Circuit should be affirmed.

Dated: January 22, 1980.

Respectfully submitted,

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

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J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR

QUESTIONS PRESENTED

1. Whether the Jicarilla Apache Tribe retained, as a fundamental attribute of its sovereignty, the power to impose a severance tax on oil and gas extracted from trust property on its reservation.

2. Whether Congress has implicitly divested the Tribe of such a power by authorizing New Mexico to impose severance taxes in respect of oil and gas extraction on the reservation, or by regulating the production and distribution of oil and gas.

3. Whether the Tribe's taxing ordinance violates the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 139-197) is reported at 617 F.2d 537. The district court's findings of fact and conclusions of law (J.A. 127-133) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1980. On April 25, 1980, a timely petition for rehearing filed by petitioners in No. 80-11 was denied (J.A. 199). By orders dated May 9 and June 12, 1980, Mr. Justice White granted petitioners in No. 80-15 extensions of time to and including July 5, 1980, within which to file their petition for a writ of certiorari (80-15 Pet. App. 1e, 1f). The petitions in No. 80-11 and No. 80-15 were filed on July 3 and July 5, 1980, respectively. Both petitions for certiorari were granted on October 6, 1980 (J.A. 203, 204). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND ORDINANCE INVOLVED

The Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398a-e, is reproduced at 80-15 Br. App. 3a-7a. The Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance is set forth at 80-15 Br. App. 13a-19a.

STATEMENT

1. The Jicarilla Apache Tribe, with an enrollment of 2,100 members, occupies a reservation in northwestern New Mexico, established by a series of Executive Orders issued between 1874 and 1912 (80-15 Br. App. 20a-24a). The entire Reservation, comprising 742,315 acres, is trust land; there are no individual allotments or non-Indian tracts. The Tribe is organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, and operates under a federally-approved Constitution and corporate charter. The original Con-

stitution, approved by the Secretary of the Interior on August 4, 1937, declared that the Tribe's powers included all those powers possessed in the past, in addition to those specifically conferred by Section 16 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 987, 25 U.S.C. 476. Subsequent revisions to the Tribe's Constitution in 1960 and 1968 have elaborated upon these powers. Article XI, Section 1(e) of the Constitution now states that the tribal council may, subject to approval by the Secretary of the Interior, "impose taxes and fees on non-members of the tribe doing business on the reservation" (80-15 Br. App. 12a-13a). The revised Constitution containing this provision was approved by the Secretary in 1969.

2. For a number of years, the Tribe has leased its oil and gas reserves, under statutory authority and with the approval of the Secretary, to non-Indian producers. The State of New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an *ad valorem* tax on oil and gas production equipment, all of which have been collected from petitioners' on-reservation activities under leases from the Tribe (J.A. 129, 155).

3. In July 1976, the Tribe adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands" (80-15 Br. App. 13a-18a). The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation," with the tax due at the time of severance and payable monthly by the well operator (*id.* at 14a). Oil and gas taken by the Tribe as royalty in kind is exempt from the tax (*ibid.*). The ordinance was approved by the Secretary in December 1976 (*id.* at 18a), with the first tax remittance due in June 1977.

4. In May 1977, a group of 17 independent and corporate oil and gas producers holding tribal leases (Merrion and Bayless, *et al.*, petitioners in No. 80-11), filed a com-

plaint in United States District Court for the District of New Mexico, seeking to enjoin enforcement of the Jicarilla tax. The claim was, *inter alia*, that the Tribe lacked inherent or statutory authority to tax; that the Secretary of the Interior improperly approved the tribal ordinance; that, pursuant to 25 U.S.C. 398 and 398c, the State had exclusive authority to impose a severance tax; and that the tribal tax discriminated against interstate commerce (J.A. 1-13).

In the consolidated case, Amoco Production Company and Marathon Oil Company (petitioners in No. 80-15) filed a separate complaint against the Tribe, tribal officials, the Secretary of the Interior and state officers, repeating the claims in the first complaint but including a request for a declaratory judgment that if the tribal tax were declared valid, the State tax should be declared invalid (J.A. 43-61).

After a hearing, the district court on July 6, 1977, granted a preliminary injunction enjoining the initial collection of the tribal severance tax, but requiring the lessees to place in escrow an amount estimated to cover three-months' tax liability. Mobil Oil and Oxy Petroleum Company (petitioners in No. 80-11) were subsequently granted leave to intervene, and filed a joint complaint alleging essentially the same causes of action as the Merrion and Bayless plaintiffs.

After a non-jury trial, the district court on December 29, 1977 entered judgment for the oil and gas producers permanently enjoining the Tribe and the Secretary from enforcing the tribal severance tax, which the court declared "illegal, unconstitutional, invalid and void" (J.A. 135). In separate findings of fact and conclusions of law (J.A. 127-133), the district court concluded that: (1) 25 U.S.C. 398c grants the State the exclusive right to impose a severance tax; (2) neither tribal sovereignty nor the powers enumerated in the Indian Reorganization Act give the Tribe the power to impose a severance tax on non-Indians; and (3) the tribal tax

violates the Commerce Clause of the United States Constitution because it is discriminatory and results in a multiple burden on interstate commerce (J.A. 132). The stated bases for the invalidity of the tax under the Commerce Clause were that the Tribe does not tax "similarly situated" oil and gas off the Reservation, although in the same geologic structure in New Mexico, that the tax is levied only on oil and gas transported off the Reservation, and that the combined State and tribal taxes would impermissibly increase the percentage of the interstate price of oil and gas paid in taxes (J.A. 130).

5. The court of appeals, sitting en banc, reversed (J.A. 141-165), two judges dissenting (J.A. 165, 176). As this Court subsequently held in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980), the court below ruled that the Tribe's power to impose the challenged tax was an inherent attribute of its sovereignty of which it had not been divested by any treaty or Act of Congress, including the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. 398c, which permitted the states to impose like taxes (J.A. 145-152, 157-161). Nor, held the court, was the Tribe's power to impose this severance tax implicitly divested by reason of any inconsistency with overriding federal interests, including those finding expression in the Commerce Clause (J.A. 146-148, 152-153, 156). Specifically, the court found that the tax is neither discriminatory nor a multiple burden offensive under the Commerce Clause (J.A. 152-156).

SUMMARY OF ARGUMENT

I

Petitioners' contention that the Jicarilla Apache Tribe lacks the inherent governmental authority to tax the extraction of oil and gas by non-Indians on the Reservation is foreclosed by the Court's decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980). There the Court held that "[t]he power to tax transactions occurring on trust lands

and significantly involving a tribe or its members is a fundamental attribute of sovereignty" that is "not implicitly divested by virtue of the Tribe['s] dependent status." Slip op. 15, 16. The consistent view of the Executive, Judicial, and Legislative Branches has been to the same effect. In the instant case, the extraction of vital and depletable resources from trust lands is without question intimately associated with the Indian land situs and significant tribal interests and therefore well within the Tribe's taxing authority under *Colville*.

Nor, contrary to petitioners' contention, has the "shared presumption" of the three branches of the federal government that tribes have authority to tax non-Indians been recognized only where a tribe may exclude the non-Indians from the reservation. The holding in *Colville*, quoted above, was not so limited, and in *Buster* v. *Wright*, 135 F. 947 (8th Cir.), appeal dismissed, 203 U.S. 599 (1905), the power to tax was recognized even where Congress had passed a statute prohibiting removal of the non-Indians. Both Congress and the Executive Branch also have recognized the importance of the tribe's ability to raise revenue for essential governmental services by taxing non-Indians doing business on the reservation, quite aside from the tribes' power to remove them.

Finally, the Jicarilla Apache Tribe's power to tax is not circumscribed merely because its reservation was established by Executive Order. The power to tax is a residuum of aboriginal independence, and it therefore does not vary depending on the manner in which a tribe's place of residence has been defined. Section 16 of the Indian Reorganization Act confirms this, for tribes occupying Executive Order reservations are considered to have the same governmental powers as those residing on reservations created by treaty or statute.

II

The Tribe's power to tax has not been divested by subsequent legislation. Petitioners are unable to cite a single reference to Indian severance taxes in connection with

the passage of the Act of March 3, 1927, which authorized the mineral leasing of lands in Executive Order reservations, or in more recent energy legislation enacted by Congress. In these circumstances, there can be no basis for concluding that the Tribe's power to "rais[e] revenues for essential government programs" (*Colville, supra*, slip op. 20) has been divested by federal law.

A. Petitioners' argument that the 1927 Act divested the Tribe of its taxing authority rests solely on the fact that Congress permitted the state to tax the severance of oil and gas on Executive Order reservations. But conceding the power of taxation to one sovereign does not ordinarily cancel the preexisting right of another government with jurisdiction over the same activity to impose a like tax. And petitioners have pointed to nothing in the background of the 1927 Act to suggest such an unusual result in this case. The 1927 Act merely extended to tribes occupying Executive Order reservations the same provisions for leasing and payment of royalties to tribes that had been enacted in 1891 and 1924 for treaty reservations. The authorization of state taxes in the 1927 Act was likewise drawn from the 1924 Act. Both, in turn, are consistent with similar provisions for imposition of state taxes in a 1919 statute permitting the leasing of "solid" minerals on treaty and Executive Order reservations and in Section 32 of the Mineral Lands Leasing Act of 1920, which governs leasing of the public domain.

It is clear that in authorizing collection of state taxes the United States did not surrender its prerogative to impose like taxes, and there is no reason to draw a different conclusion with respect to tribal taxes. The most natural explanation for the general pattern of leasing legislation is that Congress sought to provide needed revenues for those states with large tracts of tax-exempt federal land while, at the same time, eliminating a type of "tax favoritism" that federal lessees and Indian wards enjoyed under the federal instrumentality doctrine. Consistent with prior leasing statutes, the legislative his-

tory of the 1927 Act reveals a consensus from the start that states should be permitted to tax the severance of oil and gas on Executive Order Indian reservations. Accordingly, there is no basis for petitioners' contention that the Act reflects a carefully crafted compromise—under which the states would have exclusive authority to tax and the tribes would receive all royalties—that would be upset by recognizing a tribal right to tax.

B. Nor has the Tribe's power to tax been divested by the Secretary's regulation of the leasing process or by recent energy legislation. Petitioners have not suggested why, if state severance taxes are permitted, tribal taxes are inimical to the national interest. And, indeed, the National Gas Policy Act of 1977 makes express allowance for tribal as well as state severance taxes. The Secretary's regulation of the leasing process is for the Tribe's benefit, and therefore cannot be thought to have ousted the Tribe's taxing authority. In any event, the Tribe's severance tax ordinance was *approved* by the Secretary in accordance with the Indian Reorganization Act and the leasing regulations themselves.

III

A. The Tribe's severance tax is not invalid under the Commerce Clause because that Clause does not limit the regulation of commercial transactions by Indian tribes. Although *states* are barred from placing undue burdens on commerce "among the several States" or from interfering with Congress' exclusive authority to regulate commerce "with foreign Nations" and "with the Indian tribes," it is settled that constitutional restraints on the states do not apply to Indian tribes. Moreover, the text and structure of the Commerce Clause indicate that the Framers viewed tribes, like foreign nations, as sovereign entities with whom it was appropriate to enter into treaties. As a result, a tribe, like a foreign nation, cannot be thought to violate the Commerce Clause when it imposes restraints on its commercial dealings.

B. Even if the Commerce Clause restrains the Tribe's actions in some fashion, these actions are not to be judged by standards developed to ensure an "area of free trade" among the states. The background and implementation of the Indian Commerce Clause indicate that restrictive measures are appropriate in this setting. In any event, the Tribe's tax does not discriminate against oil and gas shipped off the reservation or out of New Mexico, and it does not impose a multiple burden on interstate commerce within the meaning of this Court's decisions. And even if the tax were thought defective under the Commerce Clause standing alone, Congress has sanctioned the Tribe's tax and, we assume for present purposes, the state's tax as well.

ARGUMENT

The validity of the Jicarilla Tribe's oil and gas severance tax primarily depends upon whether the Tribe, notwithstanding its "dependent status," retained the inherent power to tax and, if so, whether subsequent federal law worked a divestiture of that tribal authority. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, No. 78-630 (June 10, 1980), slip op. 15. We consider these issues in Points I and II below. In Point III we address petitioners' contention that the tribal tax is invalid under the Commerce Clause.

I. THE JICARILLA APACHE TRIBE RETAINED, AS A FUNDAMENTAL ATTRIBUTE OF ITS SOVEREIGNTY, THE POWER TO TAX THE EXTRACTION OF NATURAL RESOURCES ON RESERVATION LAND BY NON-INDIANS

Petitioners first argue (80-11 Br. 7-26; 80-15 Br. 7-15) that, quite aside from any federal legislation bearing on the question, the Tribe lacks the inherent governmental authority to tax the extraction of oil and gas by non-Indians on the Reservation. This contention is foreclosed by the Court's reaffirmation of tribal taxing authority last Term in *Washington* v. *Confederated Tribes*

of the Colville Indian Reservation, supra. In that case, it was expressly held that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty" that is "not implicitly divested by virtue of the Tribe['s] dependent status." Slip op. 15, 16.[1]

The inherent power to tax was recognized in *Colville* in respect of sales of cigarettes imported from out-of-state and sold primarily to outsiders in circumstances where it was "painfully apparent that the value marketed by the smokeshops * * * [was] not generated on the reservations by activities in which the Tribes have a significant interest." Slip op. 18. Here, in contrast, the activity taxed—extraction of vital and depletable resources on which the economic well being of the Tribe in this and future generations depends—is without question far more intimately associated with the Indian land situs and significant tribal interests. A Tribe's "interest in raising revenues for essential government programs * * * is strongest" where, as here, the value is generated on the reservation by activities involving the Tribe. Slip op. 20.

1. This view of tribal taxing authority is not of recent origin. It has been the "shared presumption" of the Legislative, Executive, and Judicial Branches since the turn of the century, and before. Compare *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Thus, officers of the Executive Branch consistently have held that Indian tribes have the inherent power to tax activities of non-

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[1] This is not to say, of course, that tribes do not have authority, as one of the " 'attributes of sovereignty over both their members *and their territory*' " (*White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 5, quoting *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added), to tax transactions occurring on fee land within the reservation, including that belonging to non-Indians. See, *e.g.*, *Buster* v. *Wright*, 135 F. 947, 951-953 (8th Cir.), appeal dismissed, 203 U.S. 599 (1906); 23 Op. Att'y Gen. 214 (1900). There is no occasion to consider that issue here, however, because the leases involved are for the extraction of oil and gas on tribal lands.

members occurring within the reservation. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra,* slip op. 15-16, citing 23 Op. Att'y Gen. 214 (1900), and *Powers of Indian Tribes,* 55 Interior Dec. 14, 46 (1934);[2] see also F. Cohen, *Handbook on Federal Indian Law* 142 (1942). Moreover, this Court's decision in *Colville* and the Tenth Circuit's decision in the instant case (J.A. 144-152) are only the most recent examples of recognition by the Judicial Branch of a tribe's inherent power to tax non-Indians. See, *e.g., Morris* v. *Hitchcock,* 194 U.S. 384 (1904); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster* v. *Wright,* 135 F. 947 (8th Cir.), appeal dismissed, 203 U.S. 599 (1905); *Maxey* v. *Wright,* 54 S.W. 807 (C.A. Ind. Terr.), aff'd, 105 F. 1003 (8th Cir. 1900); *Crabtree* v. *Madden,* 54 F. 426, 430 (8th Cir. 1893).

Congress, too, long has recognized the inherent sovereign power of the Indian tribes to tax non-Indians. For example, in an 1879 report concerning the validity of a tax imposed by the Chickasaw Nation on non-Indians who rented land or procured employment within its territory, the Senate Committee on the Judiciary stated:

> We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government, they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; *and they undoubtedly possess the inherent right*

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[2] See also 55 Interior Dec. at 17, concluding that the powers of local self-government vested in Indian tribes include the authority "[t]o levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders."

> *to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects—a right not in any sense derived from the Government of the United States.*

S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (emphasis added). See also *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392-393 (1904).[3]

In 1934, Congress enacted the Indian Reorganization Act (ch. 576, 48 Stat. 984) which, in Section 16, provides that a tribe may elect to organize under that Act and provide in its constitution for the exercise of "all powers vested in [the] Indian tribe or tribal council by existing law." 25 U.S.C. 476. Immediately after passage of the Act, the Solicitor of Interior interpreted the quoted phrase in Section 16 to include "the whole body of tribal powers which courts and Congress alike have recognized as properly wielded by Indian tribes, whether by virtue of specific statutory grants of power or by virtue of the original sovereignty of the tribe insofar as such sovereignty has not been curtailed by restrictive legislation or surrendered by treaties." *Powers of Indian Tribes*, 55 Interior Dec. 14, 18 (1934). Among these powers was the inherent authority of an Indian tribe to tax non-members.

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[3] After the Attorney General opined in 1900 that the Secretary of the Interior had the authority to enforce the Chickasaw permit tax statute by removing persons violating the statute or closing their businesses, 23 Op. Att'y Gen. 214, 219, Congress made it unlawful for the Secretary to remove any person in lawful possession of any lot or parcel in any town site designated in Indian Territory. Act of May 27, 1902, ch. 888, 32 Stat. 245, 259; see *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392-393. "The only rational inference from this legislation is that Congress never had any purpose to annul the laws of the tribes prescribing their permit taxes, or to prevent their enforcement by the passage of the deportation act of 1902, and that that act had no such effect." *Buster* v. *Wright*, *supra*, 135 F. at 958. See also *id.* at 954 (congressional approval of agreement with Creek Nation reflects an intent not to extinguish Nation's power to impose permit taxes on mercantile business).

Id. at 46-48.[4] Any other result would have been surprising in an Act passed for the purpose of "fostering tribal self-government" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra*, slip op. 18), because for Indian tribes, no less than states, "[t]he power of taxation is indispensable to their existence" as independent entities. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824). The development of a viable tribal government could not realistically have been expected to depend on taxes imposed only on Indians, in view of the poverty that has long persisted on Indian reservations. Accordingly, even assuming that the regulatory powers of Indian tribes were expected to be directed primarily toward tribal members,[5] it would be entirely consistent with this expectation for a tribe to rely in some measure on taxes imposed on non-members engaged in activities on the reservation to support essential governmental services.[6]

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[4] Indeed, as the court of appeals observed (J.A. 151), Congress was apprised of the holding in *Buster* v. *Wright, supra*, sustaining the tribal power to tax, in hearings conducted prior to passage of the Act. See *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. 269-270 (1934).

[5] But see *Colville, supra*, slip op. 15: "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians."

[6] As the Court noted in *Colville* (slip op. 16), the consensus among the branches of the federal government respecting the power to tax non-Indians on the reservation is in marked contrast to the "shared presumption" of the three branches discussed in *Oliphant* v. *Suquamish Indian Tribe, supra*, that Indian tribes do not have criminal jurisdiction over non-Indians. This is apparent from a review of the early authorities. Although Judge Parker had held that a tribal court did not have criminal jurisdiction over non-Indians in the Indian Territory (see 435 U.S. at 199-201, citing *Ex parte Kenyon*, 14 F. Cas. 353 (No. 7720) (W.D. Ark. 1878)), and the Attorney General had concluded that the Choctaws did not have criminal jurisdiction over non-Indians (435 U.S. at 198-

2. Petitioners argue, however (80-11 Br. 22-26; 80-15 Br. 8-10), that a tribe's power to tax non-Indians rests solely upon and is co-extensive with its power to exclude outsiders from its reservation. The leasing of tribal lands for oil and gas production, they say, permits their entry, terminates the Tribe's power to exclude them, and thereby abrogates whatever power the Tribe may have had to tax their activities.[7] This is a startling proposition—and one

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199, citing 2 Op. Att'y Gen. 693 (1934), and 7 Op. Att'y Gen. 174 (1855)), the early authorities discussed in the text that recognized the tribal power to tax non-Indians also principally involved measures adopted in the Indian Territory. Significantly, these measures were to be enforced with the assistance of the federal government, by expulsion of the offending non-Indian or closing his business, not through criminal sanctions imposed by the tribe. See, *e.g.*, *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 391-393.

[7] Of course, the Tribe *did* have the power to prevent petitioners from entering onto the reservation in the first place: Under 25 U.S.C. 396b, 398, and 476, the lands could be leased to petitioners only with the Tribe's consent. Under petitioners' theory that a tax must be a condition of entry, the Tribe presumably could have imposed a tax on their operations as long as that tax became effective before the lease was signed. Their argument therefore must be that when the Tribe consented to the leases here in issue, it thereby waived its right to tax the output of petitioners' operations. This waiver would, it seems, be effective for the duration of the leases, which in this case extend for as long as oil and gas are produced in "paying quantities" (J.A. 23)—in other words, until the resource is depleted. It defies reason to suggest that the Tribe, in consenting to a lease, implicitly gave up for all time the sovereign power to tax that it concededly had before the lease was entered into.

This Court has held that a license or franchise issued by a governmental body that provides for the payment of fees or royalties does not prevent the later imposition of a tax on the same operations unless the right to tax "has been specifically surrendered in terms which admit of no other reasonable interpretation." *City of St. Louis* v. *United Rys.*, 210 U.S. 266, 280 (1908). There is not in the leases or governing regulations in this case the requisite "clear and unmistakable" surrender of the taxing power. *New Orleans City & Lake R.R.* v. *City of New Orleans*, 143 U.S. 192, 195 (1892). See also *New York Rapid Transit Corp.* v. *City of*

that stands accepted principles of equitable taxation on their head.

Unlike the non-Indians attracted onto a reservation to purchase cigarettes in *Colville* (slip op. 17), petitioners avail themselves of the " 'substantial privilege of carrying on business' " on the reservation, *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 437 (1980), quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444-445 (1940). And unlike the non-Indians in *Colville*, petitioners presumably benefit substantially in their occupation of reservation lands from the provision of police and fire protection and other governmental services, as well as "the advantages of a civilized society" on the reservation the severance taxes are designed to support, *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, No. 79-509 (June 10, 1980), slip op. 19, quoting *Japan Line, Ltd* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979). But despite these significant benefits and the fact that petitioners' activities indisputably affect tribal interests in the extraction of a depletable resource, petitioners contend that the Tribe does not have the power to tax them. Under petitioners' theory, the incidence of any taxes the Tribe extends to non-Indians must be only on those, like the transient cigarette purchasers in *Colville*, who reside elsewhere and cannot assert a legal right to remain on the reservation. This proposition is, of course, flatly inconsistent with the Court's holding in *Colville*, discussed above, that a

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New York, 303 U.S. 573, 590-593 (1938). Governing regulations do provide that no regulations made after approval of a lease shall operate to affect the terms of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease (25 C.F.R. 171.28), and the leases themselves in this case contain a similar clause (J.A. 27). But petitioners conceded in the court of appeals (J.A. 161) that such a provision concerning contractual royalties and rentals does not bar the exercise of the sovereign power to tax. *Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942), relied upon by petitioners (80-11 Br. 26 n.34; 80-15 Br. 10 n.7), involved a special assessment to be used in furtherance of the objectives of the contract, an assessment that was conceded not to be a tax (315 U.S. at 616).

tribe's interest in raising revenues essential for governmental programs is strongest when the revenues "are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services" (slip op. 20).[8]

Not surprisingly, the "shared presumption" of the three branches of the federal government that tribes have the authority to tax non-Indians has not been dependent on the tribes' power to exclude. The Court's holding in *Colville* that such power is a "fundamental attribute of sovereignty" was not dependent upon a power to bar the non-Indians paying the tax from entering the reservation.[9] This conclusion is evidenced by the Court's citation (slip op. 16) to *Buster* v. *Wright*, *supra*, in which the

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[8] Moreover, absent an express authorization of state taxation such as that petitioners say is applicable here (see pages 22-23, note 16, *infra*), the activities of many Indian traders and other non-Indians with business establishments on a reservation might be exempt from state taxation as well. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, No. 78-1604 (June 27, 1980). The effect of petitioners' argument conditioning the power to tax on the power to exclude might be to exempt many non-Indian businesses on a reservation from state *and* tribal taxation—a windfall having no sound basis in law or policy.

[9] Nor was the observation that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest" (*Colville*, *supra*, slip op. 15). Petitioners in No. 80-15 (Br. 8) rely on the Court's statement that federal courts "have acknowledged the tribal power to tax non-Indians, *entering* the reservation to engage in economic activity" (slip op. 16; emphasis added). But the Court did not in this passage imply that the entry itself was the taxable event. As the citation in *Colville* to *Buster* v. *Wright*, *supra*, makes clear (see discussion in text), it is the engaging in business on the reservation that subjects the non-Indian to tax. To suggest that a tax must be imposed at the outset as a condition of entry under the lease is but another way of saying that the Tribe may be held to have waived by implication in a contract its sovereign power to tax. This is not the rule. See note, 7, *supra*.

court sustained the application of an Indian tax on non-Indian merchants for the privilege of trading within its borders despite a statute providing that persons, such as the non-Indian merchants, who were in lawful possession of town lots could *not* be removed from the Territory. *Buster* v. *Wright*, *supra*, 135 F. at 950, 957-958;[10] see note 3, *supra*.

The 1879 report of the Senate Judiciary Committee, discussed above, although it observed that the Chickasaw permit tax there in issue had as one object "to prevent the intrusion of unauthorized persons," also noted a second object—"to raise revenue." S. Rep. No. 698, *supra*, at 1, quoted in *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 389. And the report's discussion of the power to raise revenue to support essential governmental services (see pages 10-11, *supra*) was not in any manner limited to situations in which the tax was imposed as a condition to the non-Indian's initial entry on the reservation. Finally, the view of the Executive Branch, reflected early in the enforcement action under review in *Buster* v. *Wright*, *supra*, has been that the power to tax is not so conditioned. See also F. Cohen, *supra*, at 143 ("The power to tax does not depend on the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction").

Thus, there is no basis for petitioners' argument that by acquiring a lease to extract oil and gas from reservation lands they also implicitly purchased an indefinite exemption from governing ordinances, including revenue measures. To the contrary, such leases are made "under the assumption that the purchasers will comply with the local laws." *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392,

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[10] "The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, * * *." 135 F. at 958.

quoting 23 Op. Att'y Gen. 214, 217 (1900); *Buster* v. *Wright*, *supra*, 135 F. at 952-953.

3. Nor could it be suggested that the Jicarilla Apache Tribe's power to tax is circumscribed because its reservation was established by Executive Order. Because tribal sovereignty—including the power to tax—is a residuum of aboriginal independence, it cannot vary according as the National sovereign has defined the area in which the tribe will reside by one means rather than another. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). The Executive Orders setting apart lands as a "reservation" for the Tribe (80-15 Br. App. 20a-25a) in no way manifest an intent to recognize only a diminished sovereignty in the Tribe, and it may be doubted whether the President could do so, without authorizing legislation. Cf. *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941). In any event, the *Colville* decision, by expressly recognizing the authority of the Colville Tribes to tax activities on their Executive Order reservation (slip op. 6 n.12) as not less than that of the other tribes residing on treaty reservations (*id.* at 6 nn.13 & 14) has foreclosed the argument that taxing authority on Executive Order reservations is of a narrower scope.

These principles apply equally to severance taxes. The Court has recognized that tribes residing on Executive Order reservations have an interest in the use and disposition of their lands and resources that, at least unless Congress otherwise directs, is to be presumed to be the equivalent of that of tribes on reservations established by treaty or statute. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 598 (1963). The very leasing legislation at issue in this case conforms to this view, for it provides for the leasing of Executive Order reservations in the same manner as others, 25 U.S.C. 398a and b, and protects such reservations against abolition or diminishment by the President (25 U.S.C. 398d). Section 16 of the Indian Reorganization Act likewise does

not distinguish between Executive Order and treaty reservations in providing for the exercise of tribal powers, including the right to tax, or in conferring on the tribe the power to prevent the leasing of its land. 25 U.S.C. 476.[11]

II. THE TRIBE HAS NOT BEEN DIVESTED OF ITS INHERENT POWER TO IMPOSE SEVERANCE TAXES

Petitioners contend (80-11 Br. 22-41; 80-15 Br. 15-29) that even if, after accepting a "dependent status," the Tribe retained for a time the sovereign prerogative to impose the severance tax, that authority has been taken away by subsequent congressional action. But petitioners cannot cite a *single reference* to Indian severance taxes in the materials upon which they rely, much less a reference to an intent to abrogate the power to impose such taxes. Under these circumstances, there simply is no basis for concluding that the power to "rais[e] revenues for essential government programs" (*Colville*, *supra*, slip op. 20) has been divested by federal law, whether a specific statute or a more general pattern of legislation that has revealed the tribal tax as "inconsistent with the overriding interests of the National Government" (*id.* at 15-16).

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[11] Petitioners' suggestion (80-11 Br. 22-23; 80-15 Br. 13) that a different rule should apply here because of the nature of the organization of the Jicarilla Apache Tribe at the time of the Treaty of Guadalupe Hidalgo, 9 Stat. 22, is wholly without merit. Recognition of the inherent sovereignty of a particular Indian tribe does not depend on the manner or degree to which that sovereignty was *exercised* at the time the tribe came under the dominant control of the federal government. Cf. *United States* v. *Santa Fe Pacific R.R.*, *supra*, 314 U.S. at 344-346; *Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 206. Assuming, *arguendo*, that the Jicarilla Apache Tribe was in some respects different (and what tribe was not?), Congress could not have intended to freeze the status quo as of 1848, relegating tribes to whatever measures of self-government may have been within their contemplation in that year.

A. The Act of March 3, 1927

Petitioners first argue (80-11 Br. 29-32; 80-15 Br. 16-23) that, in passing the Act of March 3, 1927, to regulate the leasing of minerals on Executive Order reservations, Congress implicitly divested the Tribe of its authority to tax mineral production on the Reservation. They point to nothing in the text or legislative history of the Act remotely suggesting such a result. They simply assert that the ouster of tribal taxing power follows from Congress' decision to permit the states to tax production of minerals on Executive Order reservations. But the obstacles to that proposition—far from self-evident on its face—are overwhelming.

1. It hardly needs saying that conceding the power of taxation to one sovereign does not necessarily, or even usually, cancel the pre-existing authority of another government with jurisdiction over the same activity to impose a like tax. One need only remember that most of us pay federal and state—and sometimes also city and foreign—income taxes, subject only to such credits or offsets as each taxing authority chooses to grant. Thus, when Congress lifted the immunity previously enjoyed by lessees of Indian mineral lands, and allowed states to tax their activities, it cannot be presumed that this automatically insulated them from all other tax liability. On the contrary, the usual rule is exemplified by the Hayden-Cartwright Act (ch. 582, 49 Stat. 1521, 4 U.S.C. 104) and Buck Act (ch. 787, 54 Stat. 1059, 4 U.S.C. 105-110), permitting State taxation within other federal enclaves without affecting the power of the United States to impose its own like taxes. See 4 U.S.C. 108. Nor is the result any different in the context of an Indian reservation. The *Colville* case settles that there is no anomaly in the co-existence of state and tribal power to tax the same transaction.

2. Apparently, petitioners rely on the ambiguous status of Indian reservations created by Executive Order—as

distinguished from those established by treaty or Act of Congress. But that argument is equally flawed.

As early as 1919, Congress had included Indian reservations established by Executive Order, together with all others, in a statute authorizing leasing for "solid" minerals, which granted all royalties to the affected tribe. Act of June 30, 1919, ch. 4, 41 Stat. 31, 25 U.S.C. 399. And, well before the 1927 Act, both Attorney General Stone and Interior Solicitor Edwards had suggested that the tribes occupying Executive Order reservations were equally entitled to enjoy the revenues from oil and gas exploitation of the lands set aside for them and that the Mineral Lands Leasing Act of 1920 was accordingly inapplicable. 34 Op. Att'y Gen. 181 (1924); Op. Solic. Int. Dep't A-2592 (1924), in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indians Affairs 1917-1974*, at 101. Without any contrary indication, we are surely entitled to assume that this view prevailed in Congress and that the 1927 Indian Leasing Act was framed on this premise. Indeed, on its face, one of the major purposes of the legislation appears to have been to lay to rest any doubt on that score. Henceforth, the President was forbidden to disestablish or reduce Indian reservations created by Executive Order. 25 U.S.C. 398d. Mineral leases could be issued, in the future, only "with the consent of the [tribal] council." 25 U.S.C. 398. And all royalties were to inure to the benefit of the tribe. 25 U.S.C. 398b.

The effect of the 1927 Act was to complete the process of placing Executive Order Indian reservations—at least so far as mineral resources were concerned—on an equal footing with those established by treaty or Act of Congress. The provision permitting state severance taxes is no exception. The same rule had been enacted three years earlier, in almost identical terms, for other Indian reservations. Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398. Given this general pattern, it would seem very strange to find in the 1927 legislation a congres-

sional purpose to abrogate—uniquely in the case of tribes whose territory was defined by Executive Order—the pre-existing power of taxation.

3. In sum, conceding state power to tax mineral lessees on Executive Order reservations is, of itself, no more evidence that Congress meant to deny the affected tribes their own power of taxation than is the like congressional decision of 1924 with respect to treaty reservations. No one suggests that the 1924 Act had any such effect. Nor could such an argument be advanced.

Indeed, it is obvious that the royalty and taxing provision of the Act of May 29, 1924—copied for other Indian reservations in 1927—simply carried forward earlier provisions. We have already noticed the statute enacted June 30, 1919, governing leasing of "solid" minerals on Indian reservations generally and authorizing state severance taxes.[12] Other precedents are special provisions for oil and gas leases affecting the Osage and Quapaw Reservations, both created by Executive Order. Act of March 3, 1921, ch. 119, Section 26, 41 Stat. 1248; Act of March 3, 1921, ch. 120, Section 5, 41 Stat. 1250.[13] But perhaps the most important model is the Mineral Lands Leasing Act of February 25, 1920 (ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*), providing generally for leasing of minerals (including oil and gas) on public lands of the United States. That statute expressly preserves state taxing power on the "output of mines" (Section 32, 30 U.S.C. 189),[14] and, besides, grants the affected state a

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[12] A proviso to Section 26 of the 1919 Act, 41 Stat. 33, stipulated:

> That nothing in this section shall be construed or held to affect the right of the States or other local authority to exercise any rights which they may have, to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee.

[13] In both these statutes, the State of Oklahoma is expressly authorized to impose a tax on "the production" of minerals from Indian lands.

[14] Although the language of Section 32—like the 1919 Indian Leasing Act—speaks of "any rights [the States] may have" to

share of the royalty revenues. Section 35, 30 U.S.C. 191.[15] Yet, it is plain the United States did not thereby surrender its prerogative to impose its own like taxes. There is no reason to draw a different inference in the case of Indian minerals.

The most natural explanation for the consent-to-tax provisions in the several statutes—whether involving public domain lands, Indian reservations, or other federal enclaves—is a Congressional concern to afford the states a fair share of revenues from activities within their borders while, at the same time, ending the "tax favoritism" then enjoyed under the "federal instrumentality" doctrine by lessees of the government or its Indian wards. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 610 (1943).[16]

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impose severance taxes, this Court long ago construed the provision as an effective grant and waiver of federal immunity. *Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45 (1925).

[15] The State share, originally fixed at 32½%, was increased to 50% in 1976. See Pub. L. No. 94-579, Section 317(a), 90 Stat. 2770. The provision for the state to receive revenues through both royalties and severance taxes also establishes that it is no departure from the pattern of leasing legislation for the Jicarilla Apache Tribe to do the same.

[16] Congress believed that it was required affirmatively to consent to state taxation because of a series of decisions of this Court holding that minerals taken from Indian lands are exempt from taxation unless Congress provides otherwise. See H.R. Rep. No. 763, 69th Cong., 1st Sess. 5 (1926), citing *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U.S. 522 (1916); *Howard* v. *Gypsy Oil Co.*, 247 U.S. 503 (1918); *Largo Oil Co.* v. *Howard*, 248 U.S. 549 (1919); see also S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926). These cases were based on the federal instrumentality doctrine, which was still in force at the time and was not expressly overruled until the Court's decision in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365 (1949).

Despite the demise of the instrumentality doctrine and its formalistic approach to exemption of reservation activities from state taxation, there is a serious question whether, absent congressional consent, the state could tax an activity so pervasively regulated and

It remains only to examine the legislative history of the 1927 Act to determine whether there is to be found there what does not emerge from the text or the general pattern of like legislation. Not surprisingly, nothing of the kind appears. There is not the slightest indication of any congressional intent to abrogate tribal taxing authority.

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so important to tribal interests as the mineral leasing of tribal lands. See *White Mountain Apache Tribe* v. *Bracker, supra; Central Machinery Co.* v. *Arizona Tax Comm'n, supra.* Compare *Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra,* slip op. 20.

This issue of the state's power to tax under general principles of immunity in Indian law would be relevant in the present case only if it were found that Congress repealed the express authorization in the 1927 Act for states to tax the output of leases on Indian lands when it enacted Indian leasing legislation in 1938 (ch. 198, 52 Stat. 347, 25 U.S.C. 396a-g). The 1938 Act was intended to provide a comprehensive and uniform system for the mineral leasing of tribal lands, to bring mineral leasing into harmony with the Indian Reorganization Act, and to rectify the failure of then-existing law to give the Indians the greatest return from the leasing. S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938).

It was argued below that the 1938 Act, which repealed all inconsistent legislation (Section 7, 52 Stat 348) and contained no authorization of state taxation, effectively repealed the 1927 Act, thereby rendering New Mexico's taxes invalid. See also F. Cohen, *supra,* at 87 (1938 Act "superseded" earlier legislation); American Indian Policy Comm'n, *Final Report,* Vol. 1, at 140, 240-242 (1976) ("express, rather than implied, repeal" of 25 U.S.C. 398c "should be achieved"). The Solicitor has held that *tribal* rents and royalties received under leases issued pursuant to the 1938 Act are not subject to state taxation (84 Interior Dec. 905 (1977)); 86 Interior Dec. 181 (1979) (Jicarilla Apache tribal lands).

Because the court of appeals concluded that the 1927 Act was not, in any event, intended to divest the Indians of the power to impose a severance tax and that the tribal tax did not constitute a multiple burden on interstate commerce, that court found it unnecessary to decide whether New Mexico's taxes also are lawful (J.A. 156, 158 n.5). The question is not presented to this Court, and we assume, for purposes of this brief, that the states' power to tax under the 1927 Act remains effective.

4. The impetus for the 1927 statute was an apparent lacuna in the law. Since 1891, there had been general authority to lease Indian lands, but only where they were "occupied by Indians who have bought and paid for the same." Act of February 28, 1891, ch. 383, 26 Stat. 795, 25 U.S.C. 397. That qualification was thought to exclude Indian reservations created by Executive Order. See *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U.S. 159, 161-162, 164 (1936). The same limitation applied to the amending Act of May 29, 1924, *supra*, which permitted longer-term leases. As we have noticed, a statute enacted in 1919 embraced all Indian lands in certain states, but did not authorize oil and gas leases. Act of June 30, 1919, *supra*. That left only the Mineral Lands Leasing Act of February 25, 1920, *supra*, as potentially applicable to Executive Order reservations. Yet, that statute, governing lands and minerals "owned by the United States," divided all benefits between the federal and state governments, leaving nothing for the Indians. See Section 35, 30 U.S.C. 191. To say the least, that result raised a serious question whether the 1920 Act embraced Indian lands.

For a short period, the void was filled by administrative action. On June 9, 1922, Secretary of the Interior Fall held that lands within Executive Order reservations could not be leased under the authority of the 1891 Act as lands "bought and paid for" by the Indians but that they were subject to leasing under the Mineral Lands Leasing Act as "lands of the United States." 49 Interior Dec. 139 (1922). That ruling provoked several hundred applications under the 1920 Act to prospect for oil and gas on Executive Order reservations, particularly portions of the Navajo Reservation in New Mexico and Utah, and a number of permits were granted.[17] Within a year, how-

[17] Members of Congress repeatedly compared the decision to lease Executive Order reservations under the 1920 Act to the "Teapot Dome" scandal involving the leasing of federal oil lands within the naval reserves, for which Secretary Fall had been indicted. 67

ever, Secretary Fall's successor as head of the Interior Department recommended special legislation to provide that the proceeds from the leasing of Executive Order reservations pursuant to the Mineral Lands Leasing Act of 1920 be deposited to the credit of the tribes. 65 Cong. Rec. 149 (1923); S. Rep. No. 669, 68th Cong., 1st Sess. 1-2 (1924).[18] Under this proposal, the lessees presumably would have been subject to state taxation by virtue of Section 32 of the 1920 Act. Shortly thereafter, Attorney General Stone rendered an opinion that the Mineral Lands Leasing Act did not apply to Executive Order Indian reservations. 34 Op. Att'y Gen. 181 (1924).[19]

The Department of the Interior urged enactment of its bill as consistent with numerous other instances in which Congress had recognized the right of Indians living on Executive Order reservations to the proceeds of mineral leasing, timber cutting, and sale of surplus lands. S. Rep. No. 669, *supra*, at 2. The Senate acquiesced. 66 Cong. Rec. 998-999 (1924). In the House, the Com-

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Cong. Rec. 6113, 6116 (remarks of Rep. Frear), 11381 (remarks of Rep. Sproul), 11395 (remarks of Rep. Schafer), 11396 (remarks of Rep. Hayden) (1926).

[18] Senator Harreld, in discussing the bill, stated: "Secretary Fall has made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases." 66 Cong. Rec. 998 (1924).

[19] The processing of applications was then suspended, and the United States sued to cancel the permits granted by Secretary Fall. See H.R. Rep. No. 763, 69th Cong., 1st Sess. 5-6 (1926). The district court declined to cancel the permits, and on appeal, the United States Court of Appeals for the Eighth Circuit simply certified to this Court certain questions presented. *United States* v. *Harrison*, Equity No. 8288 (D. Utah 1925). The decision of the district court and the questions certified by the Eighth Circuit are reproduced in H.R. Rep. No. 763, *supra*, at 6-7. As Congress anticipated, *id.* at 8, the case was dismissed by stipulation following passage of the 1927 Act. *United States* v. *McMahon* [*Harrison*], 273 U.S. 782 (1927).

mittee on Indian Affairs agreed with the payment of bonuses and royalties for the benefit of the tribes, but recommended an amendment which would have authorized the states to levy taxes on production of minerals on Indian lands "in all respects the same as minerals produced on privately ownd lands," with the Secretary to pay all such taxes out of tribal funds. H.R. Rep. No. 1254, 68th Cong., 2d Sess. 1 (1925). The bill passed the House in this form, 66 Cong. Rec. 2233-2234 (1925). After the Senate initially concurred in the House amendments, the bill was recalled and further amended by the Senate, 66 Cong. Rec. 2499, 2799 (1925). The Senate amendment deleted the authorization of state taxation on mineral production on Indian lands and proposed instead to give the states 37½% of the royalties, with 62½% going to the benefit of the tribes. 66 Cong. Rec. 2799 (1924). The provision for 37½% of the royalties to be paid to the states was identical to that contained in Section 35 of the Mineral Lands Leasing Act, pursuant to which Executive Order reservation lands were to be leased under the bill. The conference committee adopted the Senate approach, H.R. Rep. No. 1637, 68th Cong., 2d Sess. (1925), but the bill failed of passage on a point of order.[20]

In its next session, the Secretary suggested that Congress pursue another approach:

> Instead of enacting legislation which would authorize the leasing of unallotted land on Executive order Indian reservations subject to the general leasing act, I believe that authority should be granted for leasing such land under terms and conditions similar to those governing the leasing of unallotted

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[20] The point of order was sustained in the House on the basis that the conferees had acted on a matter not in disagreement between the two Houses and the House had not acted on the subsequent Senate amendment. 66 Cong. Rec. 5433-5434 (1924). Last minute opposition to the bill in the House apparently was motivated by the concerns of pro-Indian legislators that any division of the royalties implied that the United States, and not the Indians, held equitable title to the land. See Note, *Tribal Property Interests in Executive-Order Reservations*, 69 Yale L.J. 627, 632-633 & nn. 30, 34, 35 (1960).

land on Indian reservations created by treaty as provided in the act of May 29, 1924 (43 Stat. 244).

S. Rep. No. 768, 69th Cong., 1st Sess. 2 (1926). Leasing under the 1924 Act was also thought to have the further advantage of yielding higher royalties of at least 12½%, as compared to 5% under the 1920 Act. *Id.* at 8. From this point, the 1924 Act—which, without controversy, had permitted State severances taxes—became the model.[21]

Still, the Secretary's proposal was similar to the bill that failed of passage in the previous Congress in that it provided for the states to receive 37½% of the royalties "in lieu of taxes" and for the tribes to receive 62½%. But the new proposal called for the states to expend their share for public roads and schools *for the benefit of the Indians.* Moreover, the Secretary made clear that the states' share of the royalties was to serve as a substitute *only* for state taxation of the lessor tribe's royalty interest; the lessees were to be subject to state taxes. S. Rep. No. 768, *supra*, at 2-4; H.R. Rep. No. 763, 69th Cong., 1st Sess. 2-3 (1926).[22]

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[21] The 1924 legislation followed the Secretary's recommendation "that legislation should be enacted whereby oil and gas leases of such lands may be continued [beyond 10 years] for so long as there is production in paying quantities." H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924); S. Rep. No. 546, 68th Cong., 1st Sess. 2 (1924); S. Rep. No. 344, 68th Cong., 1st Sess. 2 (1924). In the course of adopting legislation to serve that purpose, Congress added, expressly without objection from the Secretary, a provision authorizing the states to tax the oil and gas production of the lessees as well as the royalties received by the Indians. *Ibid.* This provision of the 1924 Act simply extended to all treaty reservations a policy adopted with respect to the Quapaw and Osage Tribes in 1921. See page 21, *supra*; 66 Cong. Rec. 6844 (1924) (remarks of Senators Hastings and Snyder); *Leasing of Executive Order Reservations: Hearings on H.R. 9133 Before a Subcomm. of the House Comm. on Indian Affairs*, 69th Cong., 1st Sess. 10-11, 50-51 (1926) (remarks of Rep. Hayden); *Oklahoma Tax Comm'n* v. *Texas Co., supra*, 336 U.S. at 366-367.

[22] Subjecting lessees' interests to state taxation would seem to have followed from bringing Executive Order reservations under the 1924 Act, which provided for such taxation.

Committees of both Houses agreed to the Secretary's proposal to authorize leasing under the 1924 Act and thus to establish

> a uniform policy for the leasing of all Indian reservation lands for oil and gas mining purposes, under the supervision of the Bureau of Indian Affairs. [The bill] simply applies existing law relating to treaty reservations to Executive-order reservations.

S. Rep. No. 768, *supra*, at 5; see also H.R. Rep. No. 763, *supra*, at 3-4. Both committees, however, carried this principle of uniformity further than had the Secretary's proposal, and eliminated his proposal that the states receive a share of the royalties:

> The bill as introduced provided for a division of the proceeds received from rentals, royalties or bonuses so that 62½ per cent would be credited to the Indians and 37½ per cent paid to the State where the leased lands are located. Payments to the State, however, were to be conditional upon the expenditure of the money so obtained upon roads within or contributory to the respective reservations or for the support of schools attended by Indian children. The practical effect of this limitation was to require the expenditure of all of the income from oil and gas leases either directly or indirectly for the benefit of the Indians.
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> To pay money to a State and then require the State to expend it for Indian purposes seems to be unnecessary and of no advantage to the State. Your committee recommends that the bill be amended by providing that the entire proceeds from oil and gas leases be deposited in the Treasury, where the same shall be subject to appropriation by Congress for the use and benefit of the Indians.

H.R. Rep. No. 763, *supra*, at 4; see S. Rep. No. 768, *supra*, at 6.[23] Giving the Indians the entire proceeds from such leasing was thought to be a continuation of

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[23] Doubt had also been expressed that the states would indeed apply the 37½% share for the Indians' benefit. 67 Cong. Rec. 6113, 6115 (1926) (remarks of Rep. Frear).

longstanding congressional policy respecting Executive Order reservations.[24]

At the same time, the committees also eliminated the exemption of the Indians' royalties from state taxation by permitting the state to levy taxes on the entire production within its borders the same as upon unrestricted lands and treaty reservation lands under the 1924 Act. S. Rep. No. 768, *supra*, at 6. Thus, as under the 1924 Act, both committees recommended tax provisions in which a distinction was made

> between the State taxes which may be levied upon the property of lessees and upon the share obtained for the Indians by providing that State or local taxes may only be levied upon the rentals, royalties or bonuses received by the Indians. The effect of this section is to permit the State to collect directly from the oil producer on Indian lands any and every kind of tax that may be assessed against others engaged in like operations elsewhere in the State. The State is not authorized, however, to collect such taxes directly from the Indians but the same are to be paid for them by the Secretary of the Interior and a proviso is added which exempts the lands or other property of the Indians from any tax lien. The final result of this legislation will be that the entire output of oil and gas will be taxed by the States, the producer paying upon his share and the Indians upon the share obtained for them.

H.R. Rep. No. 763, *supra*, at 5; see S. Rep. No. 768, *supra*, at 1. The bill also contained a provision requiring an Act of Congress for any change in the boundaries of existing Executive Order reservations.[25]

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[24] S. Rep. No. 768, *supra*, at 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 4 (1927); H.R. Rep. No. 1791, 69th Cong., 2d Sess. 3-4 (1927).

[25] In hearings subsequent to the veto of the bill, the Commissioner of Indian Affairs stressed that this provision was

> of the very greatest importance because, during the agitation over the other bill the impression went out to the Indians that

The bill passed both Houses containing the provisions described above, but was vetoed by President Coolidge because he objected to its differential treatment of permittees and applicants under the 1920 Act while their respective rights were before this Court. S. Doc. No. 156, 69th Cong., 1st Sess. 1-2 (1926); see note 19, *supra*.

In the next session of Congress, legislation identical to the vetoed bill in all respects relevant to this case, but seeking to satisfy the objection of the President as to the treatment of permittees and applicants under the 1920 Act, was introduced. See S. Rep. No. 1240, 69th Cong., 2d Sess. (1927), and H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927), both of which echo the views expressed in the 1926 committee reports. The new measure was passed, and finally signed into law. 68 Cong. Rec. 5529 (1927).

5. As is evident from the foregoing, there simply was no controversy surrounding the question whether the states should be able to tax mineral production under leases on Executive Order reservations. The only issue relevant for present purposes was whether the states should be permitted to tax the tribe's royalty interest or, in lieu of such taxes, to receive 37½% of the royalties. Congress' decision to allow the states to tax the Indian's royalty interest in no way suggests that the state's distinct power to tax the lessee was intended to preclude tribal taxation of the lessee. As petitioners acknowledge, there was no discussion whatever of tribal taxing authority in connection with passage of 1927 Act.[26] Accordingly, there is no basis for petitioners' suggestion (80-15

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the President might take by Executive order lands away from the Indians, or could do so if he wished; and so section 4 in this bill takes from the President power to change boundaries of Executive order Indian reservations or make any disposition of the lands therein; it would require an act of Congress.

Leasing of Executive Order Reservations: Hearings on H.R. 15021 Before the House Comm. on Indian Affairs, 69th Cong., 2d Sess. 43 (1927).

[26] As we have explained in Point I, the authority of Indian tribes to tax non-Indians doing business on their reservations was well settled prior to 1927.

Br. 20) that the 1927 Act was a "carefully crafted compromise" dividing up the revenues from leasing on Executive Order reservations in some precise fashion, such that a recognition of tribal taxing authority would upset a balance struck by Congress.

Moreover, tax rates may be changed periodically[27] and may vary from state to state (and even from locality to locality within the state[28]), and royalty and other terms of the lease might vary depending on market conditions and other factors at the time the lease was entered into.[29] Thus, because the 1927 Act fixed neither the amount of the royalty or other consideration that tribes may receive nor the amount of state taxes, if any, that may be imposed, Congress cannot be thought to have had in mind *any* particular division of revenues between the states and tribes. The Jicarilla Apache Tribe's receipt of revenues from its severance tax therefore is in no way inconsistent with a supposed balance struck in the 1927 Act.

In sum, the legislative history of the 1927 Act confirms what appears from the text. Far from abrogating the

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[27] As petitioners point out (80-15 Br. 24 n.30), the State of New Mexico has frequently adjusted its severance tax rate in recent years to respond to changing conditions. Petitioners, however, would deny the governing body of an Indian tribe the same opportunity to respond to changing economic and fiscal conditions by exercising its sovereign prerogative to impose additional taxes. Petitioners would prefer that the total revenues of Indian tribes from all aspects of reservation leasing operations, unlike the revenues of states from the same operations, be frozen for all time at whatever royalty rate may have been fixed at an earlier date under different circumstances. We fail to see either the logic or fairness of treating the governing bodies of the State and the Tribe differently in this regard.

[28] Section 3 of the 1927 Act, 25 U.S.C. 398c, permits taxes to be levied "by the State or local authority."

[29] The 1927 Act itself did not establish a particular royalty rate—although there generally was a minimum royalty of 12½%. See page 27, *supra*; 25 C.F.R. 171.13(a) (1980). Section 2 of the 1938 Act, 25 U.S.C. 396b, now provides that leases are to be offered for sale to the highest bidder for a bonus consideration, in addition to stipulated rentals and royalties. See 25 C.F.R. 171.3(a) (1980).

taxing power of Executive Order reservation tribes, Congress now confirmed their status as equal to that of tribes who held their lands pursuant to treaty. There is simply no basis for construing the 1927 Act—any more than its 1924 model—as impliedly divesting Indian tribes of their sovereign authority to tax activities within their reservation. In our submission, the matter is not open to doubt. But, even if one properly could characterize the 1927 Act as ambiguous in this respect, the issue must be resolved by construing the statute "generously in order to comport with * * * traditional notions of sovereignty and with federal policy of encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, *supra*, slip op. 7.

B. Other Federal Legislation and Regulation

Petitioners urge (80-11 Br. 33-35; 80-15 Br. 24-29) that the Tribe is divested of any power to tax oil and gas production because of federal law and regulation specifically governing the leasing of its lands and general federal policies concerning the production, pricing, and distribution of energy resources. This argument is wholly without merit.

1. In the first place, petitioners advance no reason to suppose that if Congress is content to allow the *states* to levy such taxes (apparently without limitation) on oil and gas produced both on and off Indian reservations,[30] the imposition of severance taxes by Indian tribes is inimical to federal interests. And, as it develops (see page 34, *infra*), Congress has very recently indicated its willingness both to accept tribal severance taxes and to incorporate them into the operation of federal energy pricing legislation in the same fashion as those imposed by the states.

Moreover, although petitioners cite a wide range of federal statutes and regulations with which tribal taxes

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[30] See note 16, *supra*. The power of the states to tax off-reservation production, absent federal preemption, cannot be doubted.

are said to be in general conflict, they point to *no* specific point of direct conflict.[31] Instead, it is urged that under *Central Machinery Co.* v. *Arizona State Tax Comm'n* and *White Mountain Apache Tribe* v. *Bracker*, *supra*, the very *existence* of the 1938 Act, 25 U.S.C. 396a-g, under which these leases were issued, together with the Secretary's regulation of leasing and production, 25 C.F.R. Part 171 and 30 C.F.R. Part 221, preempts the field. The suggestion is novel.

Preemption was found in *White Mountain* and *Central Machinery* to prevent *state* law from frustrating or disrupting federal statutes and regulations intended to protect the Indians in their dealings with non-Indians and to encourage tribal self-government and economic self-sufficiency. See *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690-691 (1965); *White Mountain*, *supra*, slip op. 11-13, 15-16; *Central Machinery*, *supra*, slip op. 3-4; *Colville*, *supra*, slip op. 18. It would be a perversion of those rules to preclude tribal laws in such an area, even where these laws were complementary and entirely consistent with the federal protection afforded the tribes. Where, as here, the Tribe's severance tax has been approved by the Secretary, the very officer responsible for the promulgation and implementation of the regulations by which petitioners assert the tribal ordinance is preempted, the argument must surely fail. Indeed, as the court of appeals noted (J.A. 160 & nn.6, 7), the 1938 Act itself, 25 U.S.C. 396b, permits tribes organized under the Indian Reorganization Act "to assume and define for themselves the leasing process" in accordance with the provisions of any constitution or corporate charter adopted pursuant to the IRA.[32]

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[31] Petitioners' argument that the tribal tax is inconsistent with Interior regulations prohibiting changes in the terms of a lease without the parties' consent is discussed in note 7, *supra*.

[32] The Secretary implemented this provision in a regulation promulgated in 1938 (3 Fed. Reg. 849) which is still in effect:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pur-

2. Finally, we turn to petitioners' argument that this tribal severance tax is generally inconsistent with the existence of federal regulation of energy production, pricing, and distribution. Because no points of particular conflict are set forth, it should suffice to show that recent federal legislation indicates Congress' view that tribal taxation is inherently no more inconsistent with federal gas pricing policy than is state or local taxation. Section 110(a) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3368, 15 U.S.C. (Supp. III) 3320 (a), provides that the maximum price of gas on its first sale may be exceeded by the amount necessary to recover state severance taxes. "State severance tax" is defined explicitly to include taxes imposed by an "Indian tribe," Section 110(c)(1), 15 U.S.C. (Supp. III) 3320(c)(1), "recognized as eligible for services provided by the Secretary * * *." Section 106(b)(2)(B)(ii), 15 U.S.C. (Supp. III) 3316(b)(2)(B)(ii).

In so providing, Congress acted with full awareness of the cases now before this Court:

> While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the right of Indian tribes to impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes.

S. Rep. No. 95-409, 95th Cong., 2d Sess. 91 (1978). To be sure, Congress' enactment of this provision does not

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suant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), * * * or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. 171.29 (1980).

confirm the Tribe's inherent power to impose severance taxes on petitioners. But, in our view, it forecloses the argument that the Tribe is divested of such a power by any overriding interest to be found in federal energy policy.[33]

Prompted in part by the Montana severance tax on coal, which is before this Court in *Commonwealth Edison* v. *Montana*, No. 80-851, probable jurisdiction noted (Dec. 8, 1980), Congress has considered several bills which would limit the rate of state coal severance taxes (S. 2695, H.R. 5294, H.R. 6625, 96th Cong., 1st & 2d Sess.), and one (S. 1778) which would limit the rate applied to energy resources (including oil, gas, and coal) extracted from federal and Indian lands. Because Congress has recently and explicitly treated tribal severance taxes like those of the states, we may again expect some legislative direction concerning tribal taxes if Congress finds severance taxes to pose an obstacle to fulfillment of national energy policies.

Under these circumstances, we submit that the tribal tax at issue here—one specifically approved by the Secretary—ought not be overturned on any notion of some general conflict with federal energy policy.

III. THE TRIBE'S TAX DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION

A. The Inapplicability of the Commerce Clause

Petitioners finally argue (80-11 Br. 41-46; 80-15 Br. 29-43) that, even if the Tribe retains the power to impose a severance tax, the particular ordinance in suit violates the Commerce Clause of the Constitution because it taxes an activity which is an integral part of the flow of commerce and discriminates against and imposes a multiple burden on interstate commerce. The most funda-

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[33] See Section 102(b)(3) and (6) of the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. No. 95-620, 92 Stat. (Supp. III) 3289; see also, Remarks on Signing National Energy Bills, 14 Weekly Comp. of Pres. Doc. 1979 (1978).

mental of the several defects in this argument is petitioners' assumption that the Commerce Clause, of its own force, limits an Indian tribe in its dealings with non-Indians.

The Commerce Clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. "[I]t long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation * * * affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'" *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454 (1979), quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). Thus, the Commerce Clause itself places limitations upon state legislation that discriminates against or places undue burdens upon commerce "among the several States" (*Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-378 (1976)), "with foreign Nations" (*Japan Line, Ltd.* v. *County of Los Angeles, supra*), or "with the Indian tribes" (*Washington* v. *Confederated Tribes of the Colville Indian Reservation, supra*, slip op. 20). But these decisions restraining the powers of the *states* have no application in the present case. "As separate sovereigns pre-existing the Constitution, [Indian] tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); see also *United States* v. *Wheeler, supra*, 435 U.S. at 328-329; *Oliphant* v. *Suquamish Indian Tribe, supra*, 435 U.S. at 194 n.3; *Talton* v. *Mayes*, 163 U.S. 376 (1896).

This conclusion is compelled by the structure and purposes of the Commerce Clause. The Framers' separate

expression in the Commerce Clause of Congress' power to regulate Indian commerce establishes that Indian tribes are not to be regarded as "States" for purposes of the Clause, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831),[34] and that their actions therefore are not subject to principles governing commerce "among the several States." The Commerce Clause speaks of Congress' power to regulate commerce "*with* the Indian tribes," just as it authorizes Congress to regulate commerce "*with* Foreign Nations" (emphasis added). The identical language confirms that the Framers intended the two phrases to be parallel and contemplated in each the establishment, through the national government, of a bilateral relationship between this Nation and a distinct sovereign entity.[35]

We must remember that those who adopted the Indian Commerce Clause spoke of Indian "Nations" with whom it was appropriate to negotiate treaties. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1831); cf. *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) at 17 ("domestic dependent nations").[36] And the origins of the Indian

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[34] "In this clause [Indian tribes] are as clearly contradistinguishable by a name appropriate to themselves, from foreign nations, *as from the several states composing the union.* They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, *the convention considered them as entirely distinct.*" 30 U.S. (5 Pet.) at 18 (emphasis added).

[35] The separateness of Indians, even those residing within the borders of the states, was emphasized in their exclusion from the population base used to apportion Representatives. Art. 1, § 2, cl. 3; see also Amend. XIV, § 2.

[36] The Court stated in *Worcester* v. *Georgia*, 30 U.S. (5 Pet.) at 18:

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those

Commerce Clause indicate that it was intended to give the national government exclusive authority over Indian tribes so that the Nation might speak with a single voice,[37] just as it must in its foreign relations. *Japan Line, Ltd.* v. *County of Los Angeles, supra,* 441 U.S. at 448-450. Surely, it could not be asserted that a foreign nation would violate the United States Constitution by adopting measures that discriminate against or unduly burden commerce with the United States, however unsatisfactory those measures may be to this Nation. Because the Indian Commerce Clause similarly speaks to intercourse with a sovereign entity, that government—the Indian nation or tribe—cannot be held to have violated the Constitution by adopting measures which might cut-off, discriminate against, or burden commerce with non-Indians.

If a tribe's legislation were deemed inimical to the national welfare, the remedies contemplated by the Framers no doubt were the negotiation or renegotiation of treaties, the enactment of legislation governing trade

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powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

[37] Article IX of the Articles of Confederation granted Congress "the sole and exclusive right and power * * * of regulating the trade and managing all affairs with the Indians," but exempted Indians who were "members of any the States" and preserved "the legislative right of any State within its own limits." As Madison wrote in *The Federalist* No. 42, this ambiguous and divided authority was an "endeavor to accomplish impossibilities." Adoption of the Indian Commerce Clause was intended to eliminate this problem by vesting Congress with exclusive authority over intercourse with Indians, whether within the states or elsewhere. *Ibid.; Cherokee Nation* v. *Georgia, supra,* 30 U.S. (5 Pet.) at 18-19; *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) at 558-559; *United States* v. *Forty-Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876); 2 M. Farrand, *The Records of the Federal Convention of 1787,* 321, 324 (1966); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 Minn. L. Rev. 432, 467-468 (1941).

and other relations,[38] or the exertion of superior force[39] —the same remedies available in our relations with foreign nations. Because the terms and duration of the recognition of Indian tribes as separate sovereigns, like the recognition of foreign nations, present questions of an essentially political nature beyond the jurisdiction of courts (see *Baker* v. *Carr*, 369 U.S. 186, 212, 215-216 (1962); compare *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913), with *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v. *Pink*, 315 U.S. 203, 228-230 (1942); *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *id.* at 1007 (Brennan, J., dissenting)), the Framers could not have intended the courts, through the Commerce Clause, to impose their own views of the proper relationship between Indians and non-Indians and to strike down measures adopted by a tribe with which the political departments of government had not seen fit to disagree. Thus, although in the absence of congressional action, a court must under the Commerce Clause be the "final arbiter of the competing demands of state and national interests" (*Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, *supra*, 325 U.S. at 369) where restrictive legislation adopted by one state may impair commerce "among the several states," and although the Commerce Clause may similarly prevent state legislation from encroaching upon the exclusive federal domain of regulating the Nation's intercourse with foreign nations and Indian tribes, it has never been suggested that, absent legislation, the Commerce Clause permits a court to be the "final arbiter" between competing economic demands

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[38] The Trade and Intercourse Acts are early examples of legislation in this area. See Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263.

[39] Cf. *United States* v. *Santa Fe Pacific R.R.*, *supra*, 314 U.S. at 347; *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

of Indian tribes or foreign nations and the persons in this country with whom they deal.[40]

B. No Commerce Clause Violation

Petitioners' challenge to the Jicarilla severance tax fares no better even if, contrary to our submission above, the Commerce Clause of its own force places some limitations on Indian tribes' regulation of commercial intercourse with non-Indians.

1. Petitioners rely on cases arising under that portion of the clause governing commerce "among the several States," which have held that a *state's* tax affecting inter-

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[40] This is not to say, of course, that all federal legislation relating to Indian affairs is unreviewable, particularly where individual rights of Indians and non-Indians are concerned. *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 83-84 (1977); cf. *Oliphant* v. *Suquamish Indian Tribe, supra.* But questions regarding the competing demands of Indians and non-Indians in commercial dealings between the two are so intimately bound up with the judgment of the political branches about the degree to which tribes should remain separate sovereign entities or be assimilated into and subject to restrictions governing the society-at-large that the Commerce Clause cannot properly serve as a means of judicial review. The Court appears to have recognized this distinction in *Weeks*, noting that although the distribution of assets there involved was reviewable under equal protection principles embodied in the Fifth Amendment, the decision to abrogate a treaty is not. 430 U.S. at 84, citing *Antoine* v. *Washington*, 420 U.S. 194, 201-204 (1975); see also *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903).

In *Muskogee National Telephone Co.* v. *Hall*, 118 F. 382 (8th Cir. 1902), relied upon by petitioners (80-11 Br. 43), Congress had enacted a statute regulating the manner in which franchises for the construction of telephone and telegraph lines could be granted; the grant of an exclusive franchise by the Creek Nation therefore was invalid because it conflicted with the federal statute. 118 F. at 385-386. Although the court also viewed the franchise as a potential obstruction to interstate commerce in telephone and telegraph messages, this discussion was not necessary to the court's decision. Any modern-day obstructions interposed by a tribe to the flow of commerce through its reservation would likewise better be analyzed in light of their possible conflict with congressional policy reflected in applicable statutes and regulations, rather than the bare language of the Commerce Clause.

state commerce is valid only if it " 'is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.' " *Mobil Oil Corp.* v. *Commissioner of Taxes, supra,* 445 U.S. at 443, quoting *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977). It is argued that these principles, drawn from the purposes of the Interstate Commerce Clause to create an "national common market" (*Hunt* v. *Washington State Apple Advertising Comm'n, supra,* 432 U.S. at 350) and "an area of free trade among the several States" (*McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330 (1944)), should apply equally to commerce with Indian tribes. But if Indian tribes are subject to any restraints imposed by the Commerce Clause, they are not those that apply to *interstate* commerce.

As we have said, tribes are not "States" for purposes of the Clause; the Framers drafted a separate provision to govern commerce with Indian tribes. The Indian Commerce Clause, on its face, distinguishes Indian commerce: plainly, it was not intended to assimilate Indian tribes into a "national common market" in which they would be constitutionally indistinguishable from the states or to establish an "area of free trade" between Indians and non-Indians. To the contrary, the Indian Commerce Clause acknowledged tribes as sovereign entities who could grant or withhold consent to enter into their territories for commercial or other purposes. The Clause shields tribes from undue state and local interference and permits Congress to preempt Indian and non-Indian intercourse with protective, even preferential, regulation. See *Morton* v. *Mancari,* 417 U.S. 535, 552 (1974); *United States* v. *Antelope,* 430 U.S. 641, 645-647, 649 n.11 (1977). From the start, the Indian Commerce Clause was understood to authorize complete and absolute federal regulation of Indian and non-Indian relations of a kind and degree then unthinkable—and even now not entirely familiar—in respect of non-Indian commerce among the states. And

as the early Trade and Intercourse Acts made clear, much of the regulation was to be prohibitive or restrictive, and exclusive, in character—far from facilitating the free flow of commerce. See Act of March 1, 1793, ch. 19, Sections 6, 7, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732, 25 U.S.C. 263. The corollary of this authorization for Congress to adopt highly restrictive measures governing intercourse with Indian tribes is that, in the absence of implementing legislation, the Clause allows comparable latitude for tribes and permits them to regulate commerce with non-Indians in a manner far more restrictive than the measures a state could pursue in regulating commerce with its sister states.[41]

Accordingly, even if the Commerce Clause does impose restraints on the actions of tribes that engage in commerce with their non-Indian neighbors, the restraints are far more limited than those placed upon the states in their commercial dealings with one another. Certainly, there is nothing about the Tribe's severance tax that so departs from the pattern of restrictive regulation governing white-Indian intercourse over the last 200 years that it could be said to violate whatever restraints on

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[41] Thus, it presumably remains true that tribes, unlike states, can close their borders to outsiders, see *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 393; *Powers of Indian Tribes*, *supra*, 55 Interior Dec. at 48-50, notwithstanding the constitutional right of interstate travel which may be rooted in the Commerce Clause. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 630 n.8 (1969); *United States* v. *Guest*, 383 U.S. 745, 758-759 (1966); *Edwards* v. *California*, 314 U.S. 160, 172-174, 177 (1941). So, also, we assume that, absent controlling acts of Congress, an Indian reservation government may ban or limit the importation or exportation of goods in circumstances forbidden to the states. See generally *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). Subject only to Interior Department approval, nothing prevents the Tribes themselves from enacting the same restrictive commercial code that federal legislation once imposed for their benefit, and, to some degree, maintains today. See 25 U.S.C. 81, 177, 251-264; *Warren Trading Post* v. *Arizona Tax Comm'n*, *supra*; *Central Machinery Co.* v. *Arizona State Tax Commission*, *supra*.

tribal legislation lay dormant in the Indian Commerce Clause. We need not press the point, however, for even if the tribes have been divested of their authority to restrict their commercial dealings with non-Indians, the Tribe's ordinance does not violate the principles of free trade embodied in the Interstate Commerce Clause.

2. Contrary to petitioners' contention (80-15 Br. 33-37), the tribal ordinance does not discriminate against interstate commerce. The ordinance does not single out for special treatment products destined for sale or consumption beyond New Mexico. Although 80% of the products do leave the state, that is a matter of indifference to the Tribe, whose severance tax applies indiscriminately whether or not the oil and gas are exported out of state. Nor is there any discrimination against oil and gas that are transported off the reservation in favor of that consumed on the reservation. The only exemption from taxation is for oil and gas taken by the Tribe as royalty in kind (Section 4; J.A. 39). That exception, of course, is not a preference for intrastate sales. In effect, the Tribe, being both the owner and the taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other.

Petitioners contend (80-15 Br. 34-35) that this exemption may prove discriminatory because a processor who locates on the reservation would enjoy a competitive advantage by purchasing the oil and gas received by the Tribe as royalty that has not been subject to the severance tax. The argument is premature, because no processor has yet located on the reservation. But in any event, even if the Tribe taxed its own oil and gas in the same manner as that sold to others, it still might choose to sell to on-reservation processors at a lower rate made possible by its increased tax revenue. The tribe would have the prerogative, if it enters the market, to prefer purchasers located within its borders in this fashion. Cf. *Reeves, Inc.* v. *Stack*, No. 79-677 (June 18, 1980).

3. Petitioners also err in contending (80-11 Br. 44-45; 80-15 Br. 39-43) that the Tribe's severance tax is in-

valid because, when added to New Mexico's similar taxes, it results in a multiple burden on commerce.[42] The multiple taxation problem arises where a number of states, each having a nexus to some portion of the interstate movement of goods or some part of a company's interstate operations, all seize upon that basis to tax the entire interstate transaction or all income from interstate operations, including those portions occurring in other states. In that situation, if each of the co-equally sovereign states taxed the entire transaction or income, interstate commerce would bear cumulative burdens not imposed on intrastate commerce. See, *e.g.*, *General Motors Corp.* v. *Washington*, 377 U.S. 436, 439-441 (1964); *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). In those cases, the Court has required an apportionment of the tax burden among the states according to the activities occurring within each. *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 14; *General Motors Corp.* v. *Washington*, *supra*, 377 U.S. at 439-441, 447-449. But no such issue is presented when taxes are apportioned according to the value of services or activities performed within the respective states. *Washington Revenue Dep't* v. *Ass'n of Washing-*

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[42] As this Court has stated, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way' * * *." *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938), quoting *Postal Telegraph-Cable Co.* v. *Richmond*, 249 U.S. 252, 259 (1919). If, as petitioners urge, commerce with Indian tribes is to be governed by principles applicable to interstate commerce, it necessarily follows that petitioners can be required to pay their "just share of [a reservation's] tax burden." Petitioners do not dispute that their activities have a sufficient nexus to the Tribe's reservation to warrant imposition of the tax or that the amount of the tax is "fairly related" to their activities on the reservation within the meaning of the four-part test enunciated in *Complete Auto*, *supra*. It is therefore odd that they should argue for a complete exemption from the Tribe's tax—and therefore from bearing their "fair share" of the reservation's tax burden.

ton Stevedoring Cos., 435 U.S. 734, 746-747 (1978). So here. There can be no question in the instant case that the Tribe's severance tax is apportioned to the activities of petitioners—the severance of oil and gas—that occurs within the borders of its reservation. *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19-20 n.12.

This conclusion is not altered by the fact that, by virtue of the congressional consent given in the 1927 Act (which consent we assume for present purposes is still effective), the State is also empowered to impose a tax on the same activity—a tax which we may assume is also fairly apportioned to petitioners' activities within the state.[43] The Tribe's power to tax cannot depend on the exercise of the state's power to do the same. Cf. *Exxon Corp.* v. *Wisconsin Dept's of Revenue*, *supra*, slip op. 19-20; *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*, 445 U.S. at 443-446.[44] The separate taxes imposed here are merely necessary incidents of Congress' continued recognition of tribes as distinct sovereign or governmental bodies existing within the territory of the states and possessing authority to tax that is derived from a source distinct from that of the states. See *Wheeler* v. *United States*, 435 U.S. 313, 319-324 (1978). The tax therefore is no more a prohibited multiple taxation of interstate commerce than would be a comparable tax imposed by the United States on oil and gas extracted from land, such as that involved here, to which it holds title.[45] The effect is merely to impose an incremental cost on engaging in commerce with Indian tribes —a familiar condition in the experience of the Nation,

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[43] Both New Mexico and the Tribe are taxing an event occurring within their respective borders, not reaching beyond to tax aspects of interstate commerce taking place in other states, as in the Court's multiple taxation cases.

[44] Only Congress, not the states, can divest an Indian tribe of its retained governmental authority.

[45] In any event, petitioners' suggestion that the Tribe can impose *no* tax because of New Mexico's concurrent tax results in no "apportionment" at all, much less a "fair" one.

and one which the Indian Commerce Clause contemplates.

Finally, even if the tax imposed by the Tribe could be thought to be inconsistent with established principles under the Interstate Commerce Clause, the courts are to be the "final arbiter[s]" in disputes arising under the Clause only where Congress has not acted. *Japan Line, Ltd.* v. *County of Los Angeles, supra*, 441 U.S. at 454. In the present case, however, Congress has intervened by enacting the Indian Reorganization Act, which authorizes Indian tribes to adopt constitutions providing for the exercise of all tribal powers they then possessed. The Jicarilla Apache Tribe has accepted that invitation, and its constitution expressly empowers the governing council to tax the affairs of non-Indians. The Secretary of the Interior, pursuant to the Reorganization Act, has approved the ordinance imposing the tax in the instant case. In these circumstances, the restraints of the Commerce Clause, standing alone, have no application.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 80-11
IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHACE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS CORPORATION, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY (now CONOCO INC.), ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION, AND OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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LISTING OF SUBSIDIARIES AND AFFILIATES OF CORPORATE PETITIONERS

The subsidiaries (other than wholly-owned) and affiliates of the corporate Petitioners are set forth in the separately printed "Special Appendix List of Corporate Subsidiaries and Affiliates of Corporate Petitioners Pursuant to Amended Rule 28.1, Rules of the Supreme Court of the United States," which has been filed previously and which is incorporated herein.

.....

THOMAS H. BURTON
On behalf of Petitioners
J. Gregory Merrion and
Robert L. Bayless, *et al.*
Cause No. 80-11

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IN THE

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J. GREGORY MERRION AND ROBERT L. BAYLESS,
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TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR,

Respondents.

REPLY BRIEF OF THE PETITIONERS

Petitioners Merrion and Bayless, *et al.* submit this Reply Brief to the Brief for Respondent Jicarilla Apache Tribe and Brief for the Secretary of the Interior.

Points not addressed by Petitioners herein are covered by the Reply Brief of Petitioners in Cause No. 80-15.

POINT I

THERE IS NO LEGAL FOUNDATION FOR THE JICARILLA APACHE TRIBE TO TAX OIL AND GAS PRODUCED UNDER FEDERALLY APPROVED LEASES

A.

The Executive, Legislative And Judicial Branches Of The Federal Government Share A Common Assumption That Indian Tribes Lack Coercive Governmental Authority Over Non-Indians Generally And Especially Those Operating Under Federal License.

Respondent Jicarilla Apache Tribe relies on its "inherent sovereignty" as the source of its authority to impose the severance tax in question here. Respondent Secretary of the Interior asserts the tribe "retained" its rights to tax non-Indians as an attribute of its sovereignty. Both rely primarily upon *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L.Ed.2d 10, 100 S. Ct. 2069 (1980) to support this contention of sovereignty. In *Colville*, the non-Indians did not challenge the tribal tax and entered the reservation with full knowledge that in doing so they would be subjected to such tribal taxation if they chose to buy cigarettes while there. The only possible tribal sanction was refusal to sell cigarettes to non-Indians refusing to pay the tax. The Court noted that relevant treaties had recognized "inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter ...." .... U.S. 65L.Ed.2d at 31, 100 S. Ct. at 2082, making it clear the power to tax was based on the tribe's power to exclude non-members from the reservation.

An analysis of the other cases relied on by Respondents shows that the courts have consistently upheld tribal permit fees on either (1) an express delegation of federal governmental authority; or (2) the tribal right to condition entry onto the reservation.

In both of these situations, Indian tribes may properly exhibit some aspects of self-determination, rather than true sovereignty. In the first situation tribes may exercise some of the federal government's delegated authority, under the reach of federal sovereignty. *United States* v. *Mazurie*, 419 U.S. 544 (1975); *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969) cert. den. 398 U.S. 903 (1970). In the second situation the tribe merely regulates access to and use of the private property of its members located on the reservation. *Morris* v. *Hitchcock*, 194 U.S. 384, 392 (1904); *Tribal Power — Exclusion of Non-Indian Attorneys*, I Inter. Solic. Op. 775, 776 (1937). Neither analysis applies in this case. The Court of Appeals below noted "no treaty or act of Congress specifically authorizes the exercise of such a taxing power" (J.A. 145), and pursuant to the lease terms the Tribe agrees lessees "essentially have unlimited access to the reservation". (Jicarilla Brief, 3).

Buster v. *Wright*, 135 Fed. 947 (8th Cir., 1905), app. dism'd, 203 U.S. 599 (1906) is the sole authority cited by Respondents in support of their contention that the power of a tribe to tax non-members may exist independently of its right to exclude. The tax involved, however, was a permit tax based on federal delegation, approved by the President under the Curtis Act and enforced by the Secretary of the Interior. The Court also traced the tribal authority to attach the tax to "the privilege which it offers to those who are not citizens of its nation of trading within its borders", and noted that, as such, it was entirely "optional". 135 F. at 949.[1]

In *Maxey* v. *Wright*, 54 S.W. 807 (Ct. App. Ind. Terr.), aff'd, without opinion, 105 Fed. 1003 (8th Cir. 1900), another case relied on by Respondents, the Creek tribe had imposed a "permit

[1] In this respect the Creek tax was similar to the "voluntary tax" this court approved in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, ... U.S. ...., 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980).

tax" on each lawyer practicing on the Creek Reservation. In an action to enjoin the federal Indian agent from collecting the tax, the Court of Appeals noted that the Creek treaty declared all persons on the reservation without consent of the tribe to be "intruders", expressly subject to removal. The Court concluded that the tribe had the right to require a permit to reside within its reservation and to "levy a pecuniary exaction therefore". 54 S.W. at 809. The Court noted, however, that any powers of enforcement resided exclusively in the United States and not the tribe, 54 S.W. at 812.

Other cases relied on to support this power to tax include *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956) and *Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958), cert. den. 358 U.S. 932 (1959). In *Iron Crow*, the Eighth Circuit Court affirmed a district court decision, 129 F. Supp. 15, 24, describing the tribal tax as one levied "for the privilege of doing business on reservation land" and collected by the United States. Also in *Barta*, it is evident from a review of the district court decision, 146 F.Supp. at 917, that the tax involved was considered merely a condition placed upon the privilege of doing business on the reservation.

In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), non-Indian owners of livestock again brought an action against federal officials to enjoin removal of plaintiffs' livestock for non-payment of a tribal tax. Since the tax was to be paid directly to the United States, this Court upheld the power of Interior to remove the livestock. 194 U.S. at 385, n. 1. As Respondent Secretary notes, the tribal tax was in effect a federal regulation "to be enforced with the assistance of the federal government, by expulsion of the offending non-Indian or closing his business, not through criminal sanctions imposed by the tribe." (Secretary's Brief, 13).

The Jicarillas interpret *United States* v. *Mazurie*, 419 U.S. 544 (1975) as "reaffirming the tribe's sovereignty over its territory and power to license non-Indians". (Jicarilla Brief, 18; see also Secretary's Brief, 9, n. 1). Petitioners do not dispute that the tribe has the power to "license non-Indians" as a condition to their entry onto the reservation, but do not interpret *Mazurie* as recognizing complete tribal sovereignty over reservation territory. *Mazurie* involved an express delegation of federal authority under 18 USC 1161 to the tribe to regulate the introduction of liquor into Indian country, so long as tribal regulation did not violate state law. The defendants applied for a tribal liquor license under this ordinance, but when it was rejected, operated their bar without a federally sanctioned license. Federal, not tribal, officers seized their alcoholic beverages and the United States attorney filed criminal charges against them in federal court. This Court made it clear that the issue in *Mazurie* was not whether the tribe had inherent regulatory authority over non-Indians, but whether Congress could specifically delegate a limited area of its governmental authority over Indian affairs to the tribe itself. 419 U.S. at 557.

More recent cases have recognized inherent limitations on tribal sovereignty as applied to non-Indians. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States* v. *Wheeler*, 435 U.S. 313 (1978).

The logic of *Oliphant*, and the cases relied upon therein, cannot be limited to criminal jurisdiction. Taken as a whole, *Oliphant* applies equally to coercive tribal regulation of non-Indians, whether considered civil or criminal. The attorney for the Suquamish tribe recognized this.[2] Both lower courts and legal

[2] Transcript of oral argument before the United States Supreme Court in *Oliphant* v. *Suquamish Indian Tribe*, at 54-55.

scholars have also recognized the logic of *Oliphant* limits tribal civil, as well as criminal, jurisdiction over non-members.[3]

United States v. *Wheeler, supra,* also recognizes this limitation on tribal authority. Speaking for the Court, Justice Marshall stated that the tribal "right of internal self-government includes the right to prescribe laws applicable to *tribe members* and to enforce those laws by criminal sanctions". 435 U.S. at 322. The *Wheeler* decision repeatedly noted that Indian tribes were generally divested of governmental sovereignty in areas involving "relations between an Indian tribe and non-members of the tribe". 435 U.S. at 326.

The line of tribal tax cases relied on by Respondents, then must be read narrowly. and should be reconsidered if they are to be expanded to recognize tribal governmental authority over non-Indians. All of these cases involve either delegation of *federal* authority to the Indians or amount merely to imposition of a *license* fee, under the loose guise of a private "tax", as a condition of entry on Indian proprietary lands. These cases did not address and did not decide the question of Indian sovereignty as it is now presented — the true sovereignty inherent in a governmental entity. It is inconceivable that courts at the turn of the century could even fleetingly have considered that Indian tribes had governmental sovereignty over non-Indians in any respect.

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[3] See, *e.g., Dry Creek Lodge Inc.* v. *Arapahoe and Shoshone Tribes,* 623 F.2d 682, 684 (10th Cir. 1980); *Montana* v. *United States,* 604 F.2d 1162 (9th Cir. 1979) cert. granted, .. U.S. .., No. 79-1128 (1979); *Sechrist* v. *Quinault Indian Nation,* C76-823 M (W.D. Wash., 1979); *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indian Tribe,* No. C-77-882 M (W.D. Wash., 1978) rev'd other ground, 634 F.2d 474 (9th Cir. 1980); Martone, *Of Power and Purpose,* 54 Notre Dame Lawyer, 829 (1979); Nowack, *et al., Constitutional Law 18* (West, 1980 Supp.); *cf., State of Wisconsin* v. *Baker,* 464 F.Supp. 1377, 1382 (W.D. Wisc. 1978).

The judicial decisions of this era, and later decisions which followed in the name of stare decisis,[4] reflected the Indian policy of the times. That policy was to conquer the Indians, then isolate them on remote reservations in the still unpopulated West in order to permit settlement of the frontier[5]. The segregation of the Indians on tribal reservations led to the federal government's administrative need for recognizing some form of tribal organization and self-government of tribal members.[6] The government therefore had to delegate to Indians some federal authority to control entry onto their reservation lands. The cases which have spoken of "inherent sovereignty", generally in dicta, and thus recognized an Indian license or "tax" for condition of entry, reflected this existing federal policy. They did not even consider the Draconian implications of Indian governmental sovereignty now raised.

B.

The Jicarilla Apaches Were Not An Organized Tribe At The Time The United States Constitution Was Adopted Nor When The Treaty of Guadalupe Hidalgo Was Entered Into.

The Jicarilla Apache Tribe argues "That Spanish officials also recognized the sovereignty of hunting tribes of Indians is confirmed in the treaty between Governor Anza of New Mexico and the Comanches in the Spanish-Comanche Peace Treaty of 1786" (Jicarilla Brief, 13-14, fn. 7).[7] The Spanish undoubtedly

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[4] *Iron Crow, supra,* where the Court spoke of "quasi-sovereignty". 231 F.2d 92, 94 (1956); *Barta, supra.*

[5] See, *e.g., Jicarilla Apache Tribe* v. *United States,* 17 Ind. Cl. Comm. 338, 370-402 (1966); *Stephans* v. *Cherokee Nation,* 174 U.S. 445, 451 (1899); *Montoya* v. *United States,* 180 U.S. 261 (1901).

[6] Act of June 30, 1834, c. 161, §10-11, 4 Stat. 729-30; Act of March 1, 1889, c.333, §6, 25 Stat. 783; Act of March 27, 1854, c. 26, §3, 10 Stat. 269.

[7] The Government takes a somewhat inconsistent position and argues that the Jicarilla Tribes "power to tax is a residuum of aboriginal

did not consider the Jicarillas an entity significant enough to merit a treaty relationship, and for good reason. The fact is there was no formal organization among the Jicarilla Apaches during the pre-reservation period and there is no evidence that they acted as a unified political entity before arriving on the reservation.[8] The Spanish treaty did not amount to a recognition of Indian sovereignty over non-Indians. Moreover, there was no treaty, either by Spain, Mexico, or the United States, with the Jicarilla Apaches.[9] The United States Senate refused to ratify the final attempt to achieve a peace treaty sought by the Jicarillas.[10]

The arguments of the Jicarillas and the Secretary that the Tribe possesses "inherent sovereignty" adequate to impose taxes on non-Indians are unsupported both legally and historically. The concept of Indian taxing authority over non-Indians does not fall within the right of Indians "to make their own laws and be governed by them" which is the full extent of Indian sovereignty. *Williams* v. *Lee*, 358 U.S. 217, 220 (1959).

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independence" and does not vary depending upon a tribe's historical organization and relations with the government. [Secretary's Brief 5, 17-18.] The Secretary's position has been rejected by the courts and by the Solicitor of the Interior himself. See, *e.g.*, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, reh. den. 348 U.S. 965 (1955); *Powers of Indian Group Organized Under IRA But Not As Historical Tribe*, I Inter. Solic. Op. 813-4 (1938).

[8] U. S. Dept. of Commerce, *Federal and State Indian Reservations*, 356 (1976); H. Ex. Docs., 33 Cong., 2d Sess., I, No. I, Pt. 1, at 378 (1854); H.R. Rep. No. 2503 (1953); Wilson, *Jicarilla Apache Political and Economic Structures*, 324-6 (U. Cal. Press 1964); Schroeder, *Apache Indians I*, 397, 411 (Garland 1974).

[9] Bender, *A Study of Jicarilla Apache Indians*, Prepared for the U.S. Dept. of Justice, 55-69, *Apache Indians IX* (Garland 1974)

[10] Sen. Doc. No. 1, 34th Cong., 1st Sess. (1855); Sen. Doc. No. 5, 34th Cong., 3rd Sess. (1856)

C.

The Indian Reorganization Act Did Not Confirm Or Reaffirm The Authority Of The Jicarilla Apache Tribe To Impose A Tax On Oil And Gas Produced By Federal Lessees.

Respondents rely on an Interior opinion to support their contention that the Indian Reorganization Act has "conferred" and "reaffirmed" tribal powers of taxation over non-Indians. (Jicarilla Brief, 23-3; Secretary's Brief, 11). That opinion, *Powers of Indian Tribes*, 55 I.D. 14 (1934), did not unqualifiedly support the presently-espoused thesis of Indian sovereignty. Solicitor Margold there recognized the limitations on tribal powers to impose burdens on federal licensees using their lands:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has a sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, *provided only such determination is consistent with applicable federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority*. 55 I.D. at 50 (emphasis supplied).

That Opinion, therefore, recognized two significant points. First, tribal "sovereignty" rests primarily upon the power to exclude or condition entry onto the reservation. Second, it is totally inappropriate when applied to the vested rights of non-Indians operating on the reservation under Federal license.

The Solicitor's conclusion that the Indian Reorganization Act does not extend coercive governmental authority to the property rights of non-Indians is consistent with subsequent Solicitors' opinions on the subject. *Rosebud Sioux Tax Ordinance*, I Inter. Solic. Op. 873, (1939) analyzed limitations inherent in enforcing taxation against non-members of the tribe. The Solicitor there noted that "a practical means of enforcement is particularly

necessary since non-members are not subject as involuntary defendants to the jurisdiction of the tribal court." *(Ibid.*, at 875). The Opinion then analyzed the 1934 Opinion and noted that it tied tribal authority to tax non-members to the power to exclude or limit their entry. *(Ibid.*, at 876).

The 1939 Opinion recognized non-members married to tribal members, or operating tribal land under federal authority, could not be subject to direct tribal taxation since they could not legitimately be removed from the reservation. Enforcement would therefore depend upon prohibiting tribal members from doing business with non-Indians. *(Ibid.)*.

The Respondent Secretary's contention that the Indian Reorganization Act does not distinguish between Executive Order and treaty reservations regarding tribal taxation (Secretary's Brief, 18) is directly contrary to another of the Interior Solicitor's opinions which found aggregations of Indians who had not historically exercised powers of tribal sovereignty could not retain all the powers enumerated in the Indian Reorganization Act. In *Powers of Indian Group Organized Under IRA But Not As Historical Tribe*, I Inter. Solic. Op. 813 (1938), Solicitor Margold stated:

> . . . [T]hat under Section 16 of the Indian Reorganization Act *a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934.* The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.
>
> In the case of these two communities three of the powers listed in the constitutions have been found not to be within the permissible limits . . . These powers were the power . . . *to levy taxes upon members of the community.* . . . [T]he last [power] *was modified to restrict it to a permissible*

> *scope by allowing the levying of assessments upon members of the tribe for the use of community property and privileges.* I Inter. Solic. Op. 814 (emphasis supplied).

The Interior Department has also recognized that the Indian Reorganization Act cannot confer tribal powers of taxation upon tribes which failed to exercise tribal autonomy prior to 1934. *Federal Indian Law,* at 886, (G.P.O. 1958), emphasizes that the Indian Reorganization Act does not, of itself, authorize tribal taxation:

> "Under Section 16 of the Act of June 18, 1934, tribal constitutions containing provisions authorizing taxation of members and non-members have been adopted by many tribes and approved by the Secretary of the Interior. Since there is no express grant of taxing power in the Act, such power must be traced to tribal autonomy, the power to exclude, or some federal statute or treaty".

In the earlier edition of that text, Felix Cohen, well known as the champion of Indian "sovereignty", recognized that "there is no express grant of taxing power in the Act", *Federal Indian Law,* 267 (Univ. N. Mex. 1945). This Court, as well as legal commentators, has recognized the Indian Reorganization Act did not grant Indian tribes coercive powers of government over non-members.[11]

The possibility of granting Indian tribes broadly expanded "municipal" authority was discussed during the debate on the Indian Reorganization Act. Substantial opposition emerged in the Senate to the original draft of the Act which specifically granted Indian tribes the power to "set up a government within a government".[12]

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[11] *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 195, n. 6 (1978); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 73 (1962); Krieger, *Principles of the Indian Law,* 3 Geo. Wash. L. Rev. 279, 302 (1935); Mettler, *A Unified Theory Of Indian Tribal Sovereignty,* 30 Hastings L.J. 89, 97 (1978); Spicer, *Cycles of Conquest* (Univ. Ariz. 1962).

[12] See State of Washington Amicus Brief, 11-15.

It is inconceivable that numerous Indian tribes, including several Amici herein, would have petitioned for repeal of the Indian Reorganization Act if it indeed conferred or reaffirmed significant tribal governmental powers yet, this is the course several principal tribes took.[13]

POINT II

ANY TRIBAL POWERS OF TAXATION POSSESSED BY THE JICARILLA APACHE TRIBE OVER NON-INDIANS HAVE BEEN PRE-EMPTED AS TO THE PETITIONERS HEREIN

A.

Tribal Regulations May Be Preempted Or Divested By Federal Interests.

The Jicarillas argue that federal interests can preempt conflicting or inconsistent state, but not tribal, authority. (Jicarilla Brief, 24-27). This assertion ignores direct parallels between this Court's decisions regarding preemption of state authority, and the doctrine of implied divestiture of tribal authority. *Cf., Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965), *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978).

The Jicarillas argue that the inherent sovereign authority of Indian tribes to tax mineral resource development must be "expressly limited or divested by Congress". (Jicarilla Brief, 27-8). This Court rejected the identical premise in *Oliphant:*

> "Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of exercise of *jurisdiction*

[13] The Shoshone, Rosebud Sioux, Pine Ridge, Yankton and Cheyenne Tribes sent delegations to the Senate seeking repeal of the Indian Reorganization Act. 78 Cong. Rec. 11736-40 (1934); Senate Committee on Indian Affairs, Survey of Conditions of the Indians in the United States, Part 37 (1936-1940), 21625, 21802, 21904.

> *over non-Indian citizens* of the United States *would belie the tribe's forfeiture of full sovereignty* in return for the protection of the United States". 435 U.S. at 211 (emphasis supplied).

In *Wheeler* the Court again recognized that "Their [Indian tribes'] incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." 435 U.S. at 323. Justice Marshall further noted that rather than requiring an express Congressional defeasance, "The areas in which such *implicit divestiture* of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326 (emphasis supplied).

While the majority opinion in *Colville* refers to a shared presumption of non-divestiture of tribal taxation authority generally, it recognizes "such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . ." ....U.S....., 65 L.Ed.2d at 29, 100 S.Ct. at 2081. In the present case there can be little doubt that tribal taxation of domestic energy sources produced from federal land is contrary "to the interests of the National Government."[14]

Jicarilla reliance upon *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) is unavailing, since that case clearly involved the relation between a tribe and its members or would-be members. Tribal power to govern its own members does not reach the asserted level of sovereignty to control non-members.

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[14] Compare the tribal intentions regarding resource regulation and development as reflected in Bureau of Competition, *Report to the Federal Trade Commission on Leasing of Indian Lands, at 40* (1975), with the interests of the National Government as discussed in the amicus brief herein of The Mountain States Legal Foundation, at 17-19, and the amicus brief filed by numerous United States Congressmen and Senators in *Commonwealth Edison Company v. State of Montana*, No. 80-851.

Bryan v. *Itasca County*, 426 U.S. 373 (1976), (Jicarilla Brief, 29), simply involved county authority to tax personal property of a tribal member residing on federal trust land. In the case at bar, the issue is whether an Indian tribe can tax a non-Indian operating under federal license on the reservation, without express authority from Congress. In *Bryan*, this Court held that the county could not do so, without express Congressional authority. In the present case, Petitioners submit that the tribe cannot validly tax in the absence of express Congressional authorization, and in the face of express authorization of state taxation.

B.

The Provisions of 25 USC 398c Were Intended To Grant the State the Exclusive Right To Tax Oil And Gas Produced From Executive Order Indian Reservations.

Respondents contend that Congress did not attempt to strike a balance between the interest of the states and Executive Order Indian Tribes in adopting 25 USC 398c. The Secretary, however, recognizes that prior to the adoption of this Act "the most important model is the Mineral Lands Leasing Act of February 25, 1920." (Secretary's Brief, 21). That 1920 Act gave the states not only the right to tax oil and gas produced on federal land, but also 32½% of the royalties *(Ibid.*, 22). Several of the various bills introduced over the three year period leading to the adoption of 25 USC 398c were patterned on the Mineral Lands Leasing Act and gave the states a percentage of the royalties, generally in addition to the right to tax the non-royalty share.[15] In the end, however, this "important model" was not copied and the States were awarded only taxation authority.

[15] See S. 876, 66 Cong. Rec. 5433 (1925); Hearings, Subcomm. of the Committee on Indian Affairs, H.R. 69th Cong., 1st Sess. on H.R. 9133 (1926); Hearings, Committee on Indian Affairs, 69th Cong., 1st Sess. on S. 3159, at 4-5 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen. 69th Cong., 1st Sess. on S. 1722 (1926).

The Jicarillas recognize there was a dispute over tribal title to minerals on Executive Order lands, but maintain that "Congressional sentiment was overwhelmingly in favor of recognizing tribal royalty rights in Executive Order reservations, and there was never any compromise based on this point." (Jicarilla Brief, 36). However, more than the "handful of congressmen" described by the Jicarillas questioned tribal title to Executive Order reservations. In addition to several congressmen and senators from the western states[16] many federal officials with supervisory responsibility over Indian affairs candidly recognized that such Executive Order tribal claims were questionable. As Commissioner of Indian Affairs, Charles Burke, said:

> ". . . it is doubtful from a strict legal sense that the court would hold that these executive orders vested in the Indians title to everything that was in the land described in those areas".[17]

Assistant Secretary of the Interior Finney agreed:

> "My opinion of the law is that public lands, under the Constitution of the United States and the laws of the United States, can only be disposed of by Congress, and that the President of the United States cannot by Executive Order vest the title in public lands either in Indians or white men. He has not the authority to do that. And consequently an executive order of this sort does not vest a fee simple title in the Indians."[18]

Finney also noted that the only pertinent federal court decision held that fee title to the minerals underlying Executive

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[16] 67 Cong. Rec. 10915, 10995 (1926); 68 Cong. Rec. 4569 (1927).

[17] Hearings, Subcomm. of the Committee on Indian Affairs, Sen., 69th Congress, 1st Sess., on S.1722 and S.3159 (1926); see also, Hearings, Subcomm. of the Committee on Indian Affairs, H.R., 69th Cong., 1st Sess. on H.R. 9133, at 121-22, 128 (1926). See also, *Lands of Papago Indians*, 54 I.D. 359, 370 (1934).

[18] Hearings, Subcomm. of the Committee on Indian Affairs, H.R., 69th Cong., 1st Sess. on H.R. 9133, at 97.

Order lands remained in the United States.[19] Assistant Secretary of the Interior Edwards expressed his opinion that the tribes did not have a "vested right" in the oil underlying Executive Order reservations since the fee remained in the United States.[20]

The Jicarilla arguments that the Indians did not oppose the state taxation alternative (Jicarilla Brief, 40) and that "there was never any compromise" between the states and the tribes as to the allocation of royalty interest and taxation rights are contrary to the record.[21]

Significantly the Tribe fails to cite any support for this contention. The very word "compromise" was used frequently in this context by both federal officials and members of the Congress.[22] In the end the states received no royalty but were allowed to tax not only the producers' share, as they were under the Mineral

[19] *Ibid.*, at 98; *cf.*, *Healing* v. *Jones*, 174 F.Supp. 211, 216 (D.Ariz. 1959).

[20] *Id.*, fn. 17, *supra*, at 81. Even John Collier, Executive Secretary for the American Indian Defense Association, and later Commissioner of Indian Affairs, recognized that the Indian tribes had a much stronger legal claim to treaty reservations than Executive Order reservations. *Ibid.*, at 87-89.

[21] Hearings, Subcomm. of the Committee on Indian Affairs, H.R. 69th Cong., 1st Sess. on H.R. 9133 at 11, 22, 25-28, 44-50 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen. 69th Cong. 1st Sess. at 95 (1926); 66 Cong. Rec. 999 (1924); Hearings, Subcomm. on Indian Affairs, Sen., 69th Cong. 1st Sess. on S.1722, S.3154, at 58, 93 (1926); Hearings, Committee on Indian Affairs, H.R. 69th Cong. 2d Sess. on H.R. 15021, at 8, 41 (1927); Hearings, Committee on Indian Affairs, Sen. 69th Cong. 1st Sess. on S.3159, and S.4152, at 9-14, 69 Cong. Rec. 4580 (1927); 66 Cong. Rec. 2234 (1925).

[22] See, *e.g.*, Hearings, Subcomm. of the Committee on Indians Affairs, H.R. 69th Cong. 1st Sess. on H.R. 9133, at 25, 26, 27, 45, 46 (1926); Hearings, Subcomm. of the Committee on Indian Affairs, Sen., 69th Cong., 1st Sess. on S.1722, S.3159, at 53, 61, 83, 84 (1926); Hearings, Committee on Indian Affairs, H.R., 69th Cong. 2d Sess. on H.R. 15021, at 42 (1927); Hearings, Committee on Indian Affairs, 69th Cong. 1st Sess. on S.3159, S.4152, at 12, 14 (1926).

Lands Leasing Act of 1920, 30 USC 181, *et seq.*, but also the Indians' royalty share.

C.

The Provisions of 25 USC 398c Apply.

The acceptance by all parties of state taxation of oil and gas produced on the Jicarilla Reservation for approximately four decades indicates 25 USC 398c controls regardless of whether Petitioners' leases were issued under that Act or the later Act of May 11, 1938, 25 USC 396. The fact that neither the Tribe nor the Secretary has challenged state taxation of these leases for more than thirty years is a factor to weigh heavily as part of the "jurisdictional history" of the Jicarilla reservation. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 604 (1977). *Blackfeet Tribe* v. *Montana*, No. CV-78-61 GF, at 11 (D. Mont. January 6, 1981).[23] This is especially true since Congress has failed to alter this administrative practice. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969).

In support of the contention that 25 USC 396, rather than 25 USC 398c, applies, the Tribe argues that the former Act allows payment of royalties directly to the tribes while the royalties under 25 USC 398c are paid to the United States Treasury for the credit of the tribe. In fact, however, Petitioners make their royalty payments to the United States Geological Survey for the benefit of the Tribe, consistent with the Tribe's own reading of 25 USC 398c. (R 79-80).

CONCLUSION

Petitioners submit there is no legal foundation for the Jicarilla Apache Tribe to impose taxes on oil and gas produced on valid

[23] It is also significant in this regard that the Jicarilla Apache Tribe failed to mention its alleged right to tax this same oil and gas production during this period. Indeed, the Jicarilla Constitutions of 1937 and 1960 did not assert the taxation authority over non-members of the Tribe. (R. 105).

federal leases on the reservation. Neither the tenuous concept of inherent sovereignty, nor the applicable treaties and laws of the United States, particularly the Treaty of Guadalupe Hidalgo or the Indian Reorganization Act, nor the Constitution of the United States itself supports or permits assertion of tribal sovereignty in this case.

Alternatively, the concept of "inherent sovereignty" requires remand to take evidence and make judicial findings and conclusions with respect to any sovereignty the Jicarilla Apache Tribe may have had, prior to subjugation of that tribe and creation of its reservation status. Inherent sovereignty does not permit attribution of the power of taxation to the Jicarilla Apache Tribe.

Assuming *arguendo,* any degree of tribal self-government, any tribal taxation which might be asserted by the Jicarilla Apache Tribe has been preempted.

For these and other reasons set forth above and set forth more fully in their initial Brief, and in their Petition for Writ of Certiorari, Petitioners Merrion and Bayless, *et al.* respectfully submit that the Jicarilla Apache Tribal tax is invalid and that the judgment and opinion of the Court of Appeals below be reversed and vacated.

Dated: March 20, 1981.

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The *amici curiae* identified below, on behalf of American Indian tribes with significant holdings of oil, gas,

coal, and other energy and mineral resources, file this brief with the consent of all parties as provided in Rule 36.2 of the Rules of this Court.

THE INTEREST OF THE AMICI CURIAE

The *amici curiae* (collectively referred to hereinafter as "*amici*") are American Indian tribes with large reservations containing exploitable oil, gas, and other mineral deposits, a non-profit tribal association organized to provide legal, technical, and administrative support to member tribes, and the largest Indian-interest organization in the United States.

The tribes are the Shoshone and Arapahoe Tribes of the Wind River Reservation in Wyoming, the Assiniboine and Sioux Tribes of the Fort Peck Reservation in Montana, the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota, the Cheyenne River Sioux Tribe in South Dakota, and the Confederated Tribes of the Colville Indian Reservation in Washington. On each of these tribal reservations, mineral lands are held by the United States in trust for the tribes and developed under mineral leases (including oil and gas leases) approved by the Secretary of the Interior pursuant to federal statute and regulation.

The tribes exercise political sovereignty over reservation lands and provide standard governmental services to tribal members and others who use reservation lands. The tribes expend substantial amounts of their own tribal funds administering mineral leasing programs, evaluating requests to lease, blocking tribal tracts into leasing units attractive to potential bidders, negotiating the terms and conditions of mineral agreements, collecting and auditing royalty payments, and regulating the environmental effects of mineral resource development on tribal members and tribal land.

The tribes believe that some part of these costs can and should be recovered in taxes. Comparable expenses incurred by the United States on public lands or by states on state-owned land are recouped through taxation. At issue in this case is the power of one tribe—the Jicarilla Apache—to impose a severance tax for that purpose on private oil and gas lessees operating on tribally-owned land. To the extent that this case raises general issues concerning the power of Indian tribes partially to defray the administrative costs of leasing programs and to raise general tribal revenues through tax levies of this sort, all tribes with energy resources have an important and immediate interest in the manner in which these issues are resolved.

Also participating as *amici curiae* are the Council of Energy Resource Tribes and the Association on American Indian Affairs, Inc., non-profit organizations that provide assistance to tribes having title to extensive energy holdings in the United States. CERT was formed in 1975 to assist member tribes in managing and developing their energy resources within the constraints imposed by economic and environmental conditions on the nation's Indian reservations. CERT also provides technical assistance in energy resource management and related financial, legal, and legislative areas. Many CERT members[1]

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[1]The member tribes of CERT are: The Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Blackfeet, the Cherokee Nation, the Chippewa-Cree Tribes of the Rocky Boys Reservation, the Crow, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation, the Hopi, the Jicarilla Apache, the Navajo Nation, the Nez Perce, the Northern Cheyenne, the Pueblo of Acoma, the Pueblo of Jemez, the Pueblo of Laguna, the Pueblo of Santa Ana, the Pueblo of Zia, the Rosebud Sioux, the Salish and Kootenai Tribes of the Flathead Reservation, the Shoshone-

[footnote continued]

partially finance their mineral leasing programs by imposing tribal taxes on production activities undertaken by private lessees on tribal lands.

The Association on American Indian Affairs, Inc., is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

INTRODUCTION AND SUMMARY OF ARGUMENT

In their briefs on the merits,[2] petitioners attack the Jicarilla severance tax on three broad grounds: first, that Indian tribes do not possess an inherent right to tax the activities of non-tribal members on Indian lands; second, that even if such an inherent right once existed, it was taken away when Congress enacted legislation in 1927 implicitly giving exclusive taxation authority to states and localities; and third, that even if the right of Indian tribes to tax the severance of energy resources does exist and has not been limited by Congress, the manner in which the Jicarilla Tribe drafted and implemented this particular severance tax offends the Commerce Clause[3]

Bannock Tribes of the Fort Hall Reservation, the Southern Ute, the Spokane, the Three Affiliated Tribes of the Fort Berthold Reservation, the Ute Tribe of the Uintah and Ouray Reservation, the Ute Mountain Ute, and the Yakima Nation.

[2] For ease of reference, the petitioners' brief in No. 80-11 will be cited as "Merrion Brief," and the petitioners' brief in No. 80-15 will be cited as "Amoco Brief."

[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, §8, cl. 3.

by imposing a multiple burden on interstate commerce and discriminating against interstate commerce.

In Part I of the Argument, *amici* argue that Indian tribes, as an aspect of inherent tribal sovereignty, have the authority to levy taxes on the reservation activities of non-tribal members. The power of an Indian tribe to tax transactions within the boundaries of its reservation is a fundamental attribute of sovereignty retained by the tribe. This Court so held in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980), one of the most recent in a long line of decisions recognizing a unique sovereign status for Indian tribes with respect to matters significantly involving a tribe or its members. Tribal sovereignty has been carefully fostered as a policy of the federal government. The power to tax is a fundamental attribute of sovereignty. No court has ever suggested that American Indian tribes have relinquished that power.

Part II of the Argument focuses on the legislative history of the 1927 Indian Leasing Act.[4] Section 3 of the 1927 Act[5] permits the imposition of production taxes by state and local taxing authorities. Although petitioners concede that the Act does not explicitly preclude severance taxation by Indian tribes, they argue that Congress implicitly intended to bar tribal taxation as part of a "compromise" necessary to secure passage of the Act.[6] But there is no support for such a compromise in the legislative history, and petitioners' argument presupposes far more Congressional discord over the substance of the 1927 Act than is shown by the record of debate.

The petitioners' argument, furthermore, incorrectly assumes that the 1927 Act is invariably the pertinent

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[4] Act of March 3, 1927, §§1-5, 25 U.S.C. §§398a-e (1976).

[5] 25 U.S.C. §398c (1976).

[6] Merrion Brief, p. 31; Amoco Brief, p. 20.

statute. Today, all Indian mineral leases—including the Jicarilla leases at issue in this case—are negotiated under the more comprehensive Indian Leasing Act of 1938,[7] a statute that makes no mention of state taxation and was obviously not intended to bar taxation from any other source.

Finally, in Part III of the Argument, *amici* briefly examine the analytic approach used by petitioners in mounting their challenge to the Jicarilla severance tax on Commerce Clause grounds. The petitioners do not recognize the distinction between the interstate commerce clause and the Indian commerce clause, two Constitutional provisions with different histories and distinct purposes. The Indian commerce clause was designed by its framers to provide protection to the members of Indian tribes by interposing the Federal Government's regulatory authority between tribes and states.

The petitioners, by using the standard analysis applicable in interstate commerce clause cases, strike the wrong balance between the interests of three sovereigns—federal, state and tribal—affected by a tribal tax.

ARGUMENT

I.

TRIBAL POWER TO TAX TRANSACTIONS SIGNIFICANTLY INVOLVING TRIBAL INTERESTS IS A FUNDAMENTAL ATTRIBUTE OF SOVEREIGNTY RETAINED BY THE TRIBES.

A. This Court's Recent Decision in *Colville* Explicitly Established that the Power to Levy Tribal Taxes is a "Fundamental Attribute of Sovereignty."

The petitioners argue that the power to tax activities by non-tribal members on tribal lands is not part of the

[7] Act of May 11, 1938, §§1-6, 25 U.S.C. §§396a-g (1976).

retained sovereignty of an Indian tribe, but rather an attribute of the tribe's territorial power as a landowner to exclude non-Indians from tribal lands.[8] The petitioners also argue that tribal taxation is inconsistent with the "dependent status" of modern Indian tribes and reflects a "platonic" notion of tribal sovereignty.[9]

These very arguments were rejected by this Court just last term when it ruled in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980), that several tribes (which had both Executive Order and treaty reservations) had the power to impose a tax on non-Indians purchasing cigarettes on tribal lands. The Court held:

> At the outset, the State argues that the Colville, Makah, and Lummi Tribes have no power to impose their cigarette taxes on non-tribal purchasers. We disagree. The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.

100 S.Ct. at 2080-81 (footnote omitted).

The petitioners in No. 80-15 seek to distinguish *Colville* from this case by arguing that the nature of the tax imposed by the Colville tribe is different from the severance tax levied by the Jicarilla Apache. The Colville tax on the sale of cigarettes, argue petitioners, "was based on the tribe's power to exclude non-members from the reservation or to attach conditions to their entry." The

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[8]Merrion Brief, pp. 12-22, 26-27; Amoco Brief, pp. 7-15.

[9]Amoco Brief, p. 10 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)).

Jicarilla tax, by contrast, "cannot be justified as an exercise of the Tribe's power to exclude."[10]

The distinction between taxes derived from a tribe's status as landlord and taxes imposed as an attribute of tribal sovereignty is one of petitioner's own making; it finds no support in the case law, and indeed is inconsistent with a well-established line of cases confirming the governmental authority of Indian tribes beyond their powers as mere landowners. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court reversed a lower court decision that—like petitioners' argument here and Judge Seth's dissenting opinion in the court below—would have effectively limited tribal powers to those of landowners or private clubs. The Court sustained a tribal ordinance regulating the sale of liquor on fee-patented reservation lands owned by non-Indians. In an opinion written by Judge Seth, the Tenth Circuit in *Mazurie* had concluded that Congress could not delegate regulatory authority over non-Indians to Indian tribal councils. The Court of Appeals reasoned that Indian tribes, by excluding non-Indians from membership, could not "exercise any degree of governmental authority or sovereignty over other citizens who do not belong . . . , *other than as landowners*. . . ."[11] This Court specifically considered and rejected Judge Seth's analysis:

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and [this] undermine[s] the rationale of the Court of Appeals' decision.

419 U.S. at 557. Because the case concerned Indians on fee lands, the Court relied on the tribe's governmental authority, rather than its proprietary interest as a land-

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[10]Amoco Brief, pp. 8-9.

owner, in sustaining Congress' grant of regulatory authority to the tribal council. *See also Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

Several decisions since *Mazurie* have reaffirmed the governmental status of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian tribes held immune from suit); *United States v. Wheeler*, 435 U.S. 313 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *Colville*, the Court described the tribe's "power to tax transactions occuring on trust lands and significantly involving a tribe or its members" as "*a fundamental attribute of sovereignty* which the tribes retain." 100 S.Ct. at 2080-81 (emphasis added). Indeed, no attribute of sovereignty is more fundamental than the power to tax. Unless Indian tribes are to be perpetually dependent on federal largesse, they must develop their own tax base. Industries doing business on trust lands of the reservations, and thus benefitting most directly from reservation resources, and adding most directly to the cost of tribal government, are clearly an appropriate part of this tax base.

B. Federal Energy Policy is not Compromised by the Levy of a Tribal Severance Tax.

There is no merit to petitioners' suggestion that a conflict exists between the concept of tribal taxation and our emerging national energy policy because a tribal severance tax may affect the economics of production and raise the cost of oil and gas for consumers.[12]

Initially, it bears emphasis that Indian economic development and the preservation of Indian sovereignty are themselves preeminent national policy goals. *White*

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[11] *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd*, 419 U.S. 544 (1975) (emphasis added).

[12] Amoco Brief, pp. 28-29; Merrion Brief, pp. 28-29.

Mountain Apache Tribe v. Bracker, 488 U.S. ____, 100 S.Ct. 2578, 2583-84 n.10 and accompanying text (1980);[13] *Bryan v. Itasca County*, 426 U.S. 373, 389 n.14 (1976).

The petitioners provide no factual foundation for their assertion that the Jicarilla tax would have an adverse impact on federal energy policy.[14] The petitioners also

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[13] For example, the Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.*, states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 *et seq.*, as well as the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.*, whose "intent and purpose . . . was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' "

White Mountain Apache Tribe v. Bracker, supra, 100 S.Ct. at 2583-84 n. 10.

[14] The record evidence in support of petitioners' claim that imposition of a tribal severance tax will cause wells to shut down is scanty at best. The trial court found that "the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla gas severance tax, if valid, onto their customers." J.A. 130. In addition, an expert economist retained by the Jicarilla Tribe reported to the trial court that if the tax were passed on, the increase in the average *annual* natural gas bill for residential customers would be approximately 74 cents in New Mexico and 15 cents in California. That report was never challenged or refuted. *See* Appellant's Brief in Chief in the Tenth Circuit, pp. 11-13.

The trial court also found that the Jicarilla oil and gas severance tax would raise over $2 million annually. Finding of Fact No. 32, J.A. 130. That amount is insignificant in relation to the annual earnings of petitioners, but it constitutes fully half of the Jicarilla Tribe's annual budget for government services. *See* Def. Exh. P. in the Trial Court.

[footnote continued]

overlook the impact of state severance taxes on oil and gas production within their borders. New Mexico, in fact, imposes six different production taxes on oil and gas. In light of the myriad taxes imposed by the states, it is ludicrous to argue that the Jicarilla tax undermines the national interests in promoting the development of domestic oil and gas resources and curbing energy costs. If heavy state taxation of energy resources is consistent with federal energy policies, how can a comparatively minor Indian tax conflict with those policies?[15]

Finally, section 110 of the Natural Gas Policy Act of 1978[16] contains a specific allowance for Indian severance taxes. Under the NGPA, the ceiling price for natural gas may be exceeded to the extent necessary to recover severance taxes imposed by states *and Indian tribes*, provided those taxes are applied uniformly both to natural gas sold within the state of production and to natural gas sold outside that state.

The Conference Report on the NGPA states:

> While severance taxes which may be imposed by an Indian tribe are to be treated in the same manner

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In 1978, Americans spent $160 billion on oil and gas. U.S. Department of Energy, Energy Information Administration, *Annual Report to Congress, 1979*, Vol. III, at 145 (1980). The partial decontrol of domestic oil and gas prices has already increased that amount by many billions of dollars annually. It is highly unlikely, therefore, that the Jicarilla severance tax will have any measurable impact at all on oil and gas prices in this country.

[15] If the answer is that state taxation may also interfere with federal energy policy or that a combination of state and tribal taxes, each reasonable when standing alone but unreasonably large in the aggregate, might threaten overall federal policy, then there is a short and complete rejoinder. Congress exercises plenary power over the rights of states and Indian tribes to impose taxes on mineral resources. Congress is in a far better position than the federal courts to assess and balance the competing economic interests of states, tribes, energy producers and energy consumers.

[16] 15 U.S.C. §3320(c) (Supp. III 1979).

> as State imposed severance taxes, the conferees do not intend to prejudge the outcome of the cases on appeal before the Tenth Circuit Court of Appeals respecting the rights of Indian tribes to impose taxes on persons or organizations other than Indians who are engaged in business activities on Indian reservations. The outcome of the cases on appeal will determine the legality of imposing such taxes.[17]

Given Congress' plenary power over Indian affairs, including the power to deny the Jicarilla the right to impose a severance tax, it is not conceivable that Congress would have taken a position of neutrality with respect to the Jicarilla tax if, as petitioners assert, the taxing power of the Indians were inconsistent with national energy policy.

C. The Tribal Power to Levy a Severance Tax is not "Unfettered," But is Subject to Legal and Practical Limitations.

There is no basis for petitioners' cavil that the decision below will erode state tax bases and subject oil and gas companies to "unfettered" taxation by tribal governments.[18] The exercise of sovereign power by tribal governments is subject to review and control by the federal government in several ways. The Jicarilla severance tax, for example, was approved by the Secretary of the Interior (as required by the tribal constitution) before it went into effect. Additional protection is provided by the waiver of tribal immunity from civil suit in paragraph 13 of the taxing ordinance.[19] And even if the Secretary and the federal courts approved an unreasonable taxing ordinance, Congress would still have plenary power to delimit tribal taxing authority. The specter of non-Indians being

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[17] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 91, *reprinted in* [1978] U.S. Code Cong. & Adm. News 8983, 9007.

[18] Amoco Brief, p. 13; *see* Merrion Brief, p. 10.

[19] The ordinance is reproduced at Amoco Brief, pp. 17a-18a.

placed at the financial mercy of tribal governments with unfettered taxing power is entirely imaginary.[20]

II.

THE LEGISLATIVE HISTORY OF THE 1927 ACT IS DEVOID OF ANY INDICATION, EXPRESS OR IMPLIED, THAT CONGRESS INTENDED TO PREEMPT TRIBAL TAXATION BY GRANTING STATES AN EXCLUSIVE STATUTORY TAXING POWER.

The 1927 Indian Leasing Act was one in a series of measures authorizing oil, gas and mineral leasing on lands under federal control, including Indian lands. The 1927 Act filled a void in existing law by authorizing oil and gas leasing on Indian reservations created by Executive Order. Section 3 of the Act contained language common to all these statutes permitting states and localities to tax the output of oil and gas leases.

The parties agree that the 1927 Act did not expressly withdraw or limit the inherent authority of Executive Order tribes to levy a tax on oil and gas production. The parties also acknowledge that the Act's legislative history does not specifically evince such an intent. The petitioners claim, nonetheless, that Congress implicitly intended Section 3 to preclude tribal taxation and manifested that intent by adopting a "carefully crafted compromise" on the language of Section 3.[21] This tenuous argument is refuted by the well established principle that implicit abrogations of important Indian rights are heavily dis-

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[20]Indian tribes are of course well aware of the economic constraints on prohibitive levels of taxation. Tribes realize no energy revenue at all unless their resources are developed and their lands are leased. Private companies must be attracted to reservation lands, and the surest way of doing so is to offer favorable leasing terms and modest tax rates. Tribes with mineral resources depend significantly on lease payments as a source of tribal revenue, and are unlikely to jeopardize income from that source.

[21]Amoco Brief, p. 20.

favored, as well as by the legislative history of the 1927 Act itself and the language and history of earlier Indian and public leasing statutes.

A. Courts Do Not Favor Arguments Premised on Implicit Abrogation of Indian Rights.

Decisions of this Court create a stout presumption against implicit abrogation of Indian rights. In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court rejected a claim that a Congressional grant of power to a state impliedly diminished Indian rights. The Minnesota Supreme Court had held that Congress, by enacting a grant of civil jurisdiction to the state coupled with an express exclusion of any state rights to tax real or personal property belonging to Indians and held in trust by the United States, had implicitly consented to other forms of taxation of Indians. In light of "the virtual absence of expression of Congressional policy or intent" respecting the grant of civil jurisdiction and "the total absence of mention or discussion regarding a Congressional intent to confer upon the states an authority to tax Indians or Indian property on reservations," 426 U.S. at 381, a unanimous Court observed that "nothing . . . remotely suggests that Congress meant the Act's extension of civil jurisdiction to the states should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations'. . . ." *Id.* at 388 (citation omitted). Therefore, concluded the Court, "we must be guided by that 'eminently sound and vital canon' . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 392 (citations omitted).

The principle that an intent to abrogate or diminish Indian rights should be very clearly stated has often been

applied to reject claims that Congress has implicitly diminished attributes of tribal sovereignty. Just last term, this Court stated that "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. ____, 100 S.Ct. 2578, 2583-84 (1980). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In sum, "[t]he canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine v. Washington*, 420 U.S. 194, 199 (1975); *accord, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). Courts are reluctant to speculate on Congressional intent when the result would be to diminish rights of Indian self-government. The 1927 Act was no different from any other Indian act; it was remedial in intent, and should be construed in that spirit.

B. Placed in Proper Legislative Context, the 1927 Act Was Merely an Extension of Established Leasing Principles to Executive Order Reservations.

The petitioners argue that the 1927 Act represented a special and unique legislative compromise, under which states were given an exclusive power to tax oil and gas production from Indian mineral leases on Executive Order reservations and tribes were given the exclusive right to receive royalties.[22] The short answer to this argument is that the 1927 Act was not unique. By 1927, Congress had enacted a series of laws specifying the terms and conditions of mineral leasing on treaty reservations.

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[22]Merrion Brief, pp. 29-32; Amoco Brief, pp. 20-22.

These laws all gave full royalty rights to the tribes and consented to state taxation of leasehold revenues. Section 3 of the 1927 Act simply extended to Executive Order reservations what was by then a settled policy of allowing tribes to keep royalty payments and allowing states to tax the proceeds from federal oil and gas leases.

In the four-year period after 1920, Congress passed four separate acts involving leasing activities on treaty reservations.[23] In each case, the Act contained a provision allocating all royalties to the tribes and consenting to state taxation of leased interests. These provisions were nearly identical to the ones later contained in Section 3 of the 1927 Act. Not once were these provisions debated on the floor of either house. Not once did they provoke any semblance of a rift between states rightists and advocates of Indian sovereignty.

As matters stood in 1924, lands on treaty reservations could be leased to private developers, with Indians receiving the royalties and states permitted to tax mineral production. The arrangement common to all these leasing statutes was that tribes received royalties from mineral leases and states could tax mineral interests. The 1927

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[23] Act of March 3, 1921, §26, 41 Stat. 1249 (1921); Act of March 3, 1921, §5, 41 Stat. 1250 (1921); Act of April 28, 1924, 25 U.S.C. §401 (1976); Act of May 29, 1924, 25 U.S.C. §398 (1976).

The most important of these enactments was the last. The Act of May 29, 1924, amended an earlier 1891 Act which authorized mineral leasing on treaty reservations. The chief purpose of the 1924 Act was to lengthen the term of Indian oil and gas leases on these reservations, which had been fixed at ten years by the 1891 Act. Remarks of Senator Harreld, 55 *Cong. Rec.* 5492, 8597 (1924). The House Committee on Indian Affairs added a provision to the bill permitting state taxation, and the Interior Department did not oppose this addition. H.R. Rep. No. 386, 68th Cong., 1st Sess. 2 (1924) (letter of March 22, 1924, from Secretary of the Interior Hubert Work to Chairman Homer P. Snyder, House Committee on Indian Affairs). It passed without controversy.

Act followed this established pattern. No compromise was required to secure its passage.

C. The Legislative History of the 1927 Act Reveals No Trace of a "Compromise" Securing Exclusive Taxation Authority for the States.

The petitioners contend that the legislative history of the 1927 Act illustrates a schism between Indian advocates in the House, who wished to secure all royalty revenues for the tribes, and states rights advocates in the Senate, who wanted to allocate a portion of royalty revenues to the states.[24] The schism was resolved, petitioners contend, when states rightists agreed to allocate all royalties to the tribes in exchange for an implicit guarantee that states would be given exclusive authority to levy production taxes on private lessees.

This is not at all what happened. The legislative history shows clearly that Congressional sentiment was overwhelmingly in favor of allocating all royalty rights to tribes on Executive Order reservations, and that no "compromise" was ever necessary to ensure passage of the Act in that form.

To understand the fallacy in petitioners' argument, some appreciation of the history of Indian mineral leasing legislation is required. Prior to 1916, state efforts to tax the proceeds of private mineral development on federal and Indian lands were rebuffed by application of the "federal instrumentality" doctrine. In a series of cases decided soon after the turn of the century, this Court held that developers operating on public lands were "instrumentalities" of federal policy and were therefore insulated from state and local taxation.[25]

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[24]Merrion Brief, pp. 31-32; Amoco Brief, pp. 19-20.

[25]*United States v. Rickert*, 188 U.S. 432 (1903); *Choctaw, Oklahoma & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914);

These decisions prompted congressmen from energy-rich western states to address state taxing power in a number of federal and Indian leasing bills. One of the first of these was H.R. 406, introduced in the House of Representatives on December 6, 1915. The original bill contained a standard provision authorizing the Secretary of the Interior to promulgate implementing regulations. When the bill was marked up by the House Committee on Public Lands in early 1916, that provision was amended to include what appears to have been the first generally applicable consent to state taxation of leasing activities on federal lands.[26] When H.R. 406 was considered on the House floor in 1916, the Committee amendment containing the state taxing proviso was perfected and adopted by voice vote with virtually no debate.[27] Different versions of the bill subsequently passed the House and Senate,

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Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918) (per curiam); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919) (per curiam).

[26] "[N]othing in this act shall be construed or held to confer or limit the rights of the States or other local authority from exercising any rights which they may have to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee." 53 *Cong. Rec.* 1122 (1916). The legislative history shows that the proviso was prompted by a memorandum prepared in 1915 by the Chief of the Reclamation Service at the Department of the Interior. The memorandum purported to analyze the question "whether the exaction of a Government rental or charge will prevent the States wherein the lands are situate from taxing the improvements, rights, and interests or products of the permittees or lessees," and concluded that the states had broad common-law rights of taxation. The memorandum was widely circulated, but was quickly disavowed by Interior Secretary Franklin Lane, who characterized it as "the individual opinion of the writer, and . . . not a decision of this department in the broad sense. . . ." The resulting confusion apparently convinced the House Committee that legislative clarification was required. *Id.* at 1123-24.

[27] *Id.*

each containing the state taxing proviso; but the measure perished when the 63rd Congress ended before differences could be reconciled in conference.

Indian leasing legislation containing a similar state taxing proviso was considered by the 64th and 65th Congresses, and was ultimately enacted as the Act of June 30, 1919.[28] This Act, which authorized leasing of unallotted Indian lands (including Executive Order reservations) in named states for certain minerals—excluding oil and gas—was the first federal leasing statute to authorize state taxation. The legislative history of the 1919 Act reveals that the state taxing provision was barely debated, but was simply one of many provisions incorporated from earlier versions of the bill.[29]

The following year, Congress enacted the comprehensive Mineral Leasing Act of 1920 to rationalize and modernize the leasing of mineral rights on public lands.[30] Under the 1920 Act, royalty revenues were divided between the states and the federal government, with states receiving 37-1/2 percent of the royalties and the federal government the remainder.[31] Once again, without debate, Congress included a provision consenting to state taxation of lessees of public lands.[32]

The germ of petitioners' argument lies in what happened next. In 1922, President Harding's notorious Secretary of the Interior, Albert Fall, issued an opinion holding that Executive Order reservations were to be treated for purposes of mineral leasing like public lands

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[28] 25 U.S.C. §399 (1976).

[29] H.R. Rep. No. 4, 66th Cong., 1st Sess. 1-5 (1919).

[30] 30 U.S.C. §181 *et seq.* (1976).

[31] *Id.*, §35, 30 U.S.C. §191.

[32] *Id.*, §32, 30 U.S.C. §189. The state taxing provision was taken word-for-word from the final version of the 1919 Indian leasing act.

"owned by the United States" within the meaning of the 1920 Mineral Leasing Act.[33] The ruling created a simple and immediate problem. The 1920 Act allocated all revenues from mineral leases to federal and state governments. If the 1920 Act were deemed to apply to Executive Order Indian reservations, then Indian tribes with title to those reservations would realize no revenue from mineral leases on their lands. That result was inequitable, since under existing law tribes with *treaty* reservations were entitled to keep all revenues generated from mineral leasing activities.

When Hubert Work replaced Albert Fall in 1923, one of his first actions as Secretary was to repudiate the opinion of his predecessor and prepare draft legislation giving all royalty revenues on Executive Order reservations to Indian tribes.[34] In 1923, the Interior Department's draft bill was introduced as S. 876. Its purpose was succinctly described by Senator Harreld:

> Secretary Fall has made a ruling which embarrasses the present Secretary very much. He made a ruling that royalties or bonuses obtained from Executive Order Indian lands should be deposited to the credit of the United States. That ruling has not been followed in other cases.[35]

S. 876 passed the Senate in late 1924.[36] Early the next year, the House Committee on Indian Affairs amended the bill to add a state taxing proviso identical to the ones in the 1921 and 1924 treaty reservation acts.[37] As

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[33] *E. M. Harrison*, 49 L.D. 139 (1922), *reprinted in* Hearings on H.R. 9133 Before a Subcommittee of the House Committee on Indian Affairs, 69th Cong., 1st Sess. 73-77 (1926).

[34] *See* S. Rep. No. 669, 68th Cong., 1st Sess. 1-2 (1924).

[35] 66 *Cong. Rec.* 998-99 (1924).

[36] 66 *Cong. Rec.* 999 (1924).

[37] *See* note 23, *supra.*

amended, the bill passed the House in 1925.[38]

When it returned to the Senate, however, the bill was amended to include a division-of-royalties formula patterned after the formula in the Mineral Leasing Act of 1920. Under the formula 62-1/2 percent of the royalty revenues were to be allocated to Indian tribes and 37-1/2 percent were to go to the states; but the Senate also required the states to spend their share of the revenues for "the construction and maintenance of public roads or for the support of public schools or other public educational institutions" on Indian reservations.[39] The restriction displeased many in Congress who regarded the formula as inappropriate in the context of Indian lands and felt that the theoretical allocation of royalties between states and tribes was an empty formalism inconsistent with Congress' intent that tribes were to enjoy the beneficial interest from all of the royalties. The Senate therefore discarded the whole royalty formula, and it never reappeared in later drafts.[40]

This action, described by petitioners as a carefully crafted compromise between Indian advocates and pro-state forces, was not a compromise at all.[41] Under the

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[38]66 *Cong. Rec.* 2233-34 (1925).

[39]66 *Cong. Rec.* 5433 (1925). *See also Hearings Before a Subcommittee of the Committee on Indian Affairs, United States Senate, on S.1722 and S.3159*, 69th Cong., 1st Sess. 2 (1926).

[40]S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926).

[41]The *amici* must pause at this point to make two observations about petitioners' characterization of the legislative history. In the first place, the final version of Section 3 of the 1927 Act was never described by any of the participants as a compromise, a puzzling omission if petitioners are to sustain their contention that two factions engaged in the kind of give and take usually associated with a political compromise.

Second and more important, even if petitioners are correct in describing the 1927 Act as compromise legislation, there is nothing

[footnote continued]

formula in the early Senate version, the states did not have beneficial use of any revenue from Indian lands, since the 37-1/2 percent share of leasing revenues nominally given to the states had to be held in trust for Indian purposes. To imply, as petitioners do, that congressional Indian advocates insisted on 100 percent of the leasehold royalties and gave up their right to tax in order to seal the bargain is to distort the legislative history. Indian tribes would have received no benefit from such a compromise, since they already received beneficial use of 100 percent of the royalties.

As reported by the Senate in 1926, the bill contained the standard state taxing provision and deleted the royalty division formula in favor of the provision from the original House bill allocating all royalty revenues to the tribes. The Senate report merely noted that the state taxing provision was "the same as that of the Act of May 29, 1924, applicable to treaty reservations," and acknowledged that the state taxing provision from the original House version was more consistent with a half-century of congressional policy for Indian reservations than the approach first espoused by the Senate.[42]

The record of debate on the 1927 Act shows no discernible disagreement or compromise over royalties or state taxation. The record is wholly devoid of any explicit indication that Congress, by consenting to taxation by the states, thought it was necessarily taking rights away from the Indians. The 1927 Act was delayed by a controversy over whether Executive Order Indian reservations were "public lands." Congress conclusively resolved that question by treating Executive Order reservations (as

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in the legislative history to suggest that preemption of tribal taxation was part of the bargain. Tribal taxation, in fact, was never discussed in the House or Senate.

[42]S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926).

it had in the 1919 Act) *exactly* as it had treated reservations established by treaty: Indian tribes received all royalty and rental income, and the ordinary, commonplace authorization was given to states to tax production. States were given no special rights or powers respecting Executive Order Indian reservations that they had not already been granted by earlier Indian leasing acts. There was simply no special or unique "compromise" embodied in the Act to preempt Indian tribal taxation.

D. The 1938 Act is Wholly Inconsistent with Petitioners' Construction of the 1927 Act.

The main thrust of petitioners' briefs is that the state taxing provision in the 1927 Act preempts tribal taxation of oil and gas production on Indian lands. The argument ignores the fact that Congress did not stop with that Act. Eleven years later, Congress enacted a comprehensive Indian leasing statute that was designed to replace the haphazard patchwork of leasing laws in effect at that time.[43] By its terms, the 1938 Act authorized tribes to assume a far greater role in the supervision and implementation of the Indian leasing program. The Act also repealed all prior, inconsistent legislation.[44]

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[43]Act of May 11, 1938, 25 U.S.C. §§396a-g (1976). In 1937, the Department of the Interior proposed a major overhaul of existing leasing laws to bring them into conformity with the Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.* (1976). In a letter to the Chairman of the Senate Committee on Indian Affairs, the Acting Interior Secretary wrote that the Department's draft legislation was designed "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes" and "to bring all mineral leasing matters in harmony with the Indian Reorganization Act. . . ." S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937). The draft legislation subsequently became the 1938 Act. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 323 (1942).

[44]Act of May 11, 1938, §2, 25 U.S.C. §396b (1976); *id.*, §7, 52 Stat. 348 (1938).

Today, the 1938 Act is the controlling Indian leasing law, and virtually all oil and gas leasing on tribal lands is now conducted under that Act and its implementing regulations. If the 1927 Act retains any vitality at all—an issue that was disputed by the parties in this Court and not decided by the Tenth Circuit—then two things, at least, are clear. First, the passage of comprehensive leasing legislation in 1938 without a state taxing provision and with a broad invitation to the tribes to assume a larger role in the supervision of oil and gas leasing seriously undercuts petitioners' argument that Congress intended—and still intends—to vest exclusive taxing power in the states.[45] And second, a decision premised upon construction of the 1927 Act assumes very little practical importance since virtually no Indian tribe—not even the Jicarilla Apache—currently leases under that Act.

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[45]The Tenth Circuit so held:

> Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. §476, determine the terms upon which they will lease their lands and regulate the operations of their lessees. Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 548-49 (10th Cir. 1980) (footnote omitted).

III.

THE CONSTITUTION RECOGNIZES A DISTINCTION BETWEEN "INTERSTATE COMMERCE" AND "INDIAN COMMERCE" AND PETITIONERS IGNORE THAT DISTINCTION BY PREMISING THEIR CONSTITUTIONAL ARGUMENT ON CASES DECIDED UNDER THE INTERSTATE COMMERCE CLAUSE.

The *amici* offer a brief concluding comment on petitioners' argument that the Jicarilla severance tax violates the Commerce Clause by discriminating against and imposing a multiple burden on interstate commerce. In fact, the Jicarilla tax has neither effect on interstate commerce. The petitioners' arguments on these points were roundly rejected in the court below[46] and have been comprehensively addressed in the brief of the respondents. They will not be addressed in this brief.

Instead, *amici* devote their attention to a threshold issue: whether the traditional Commerce Clause analysis used by petitioners applies at all to the commercial activities and policies of Indian tribes. As petitioners correctly observe,[47] the issue has never been resolved by this Court. In *amici's* view, however, the Constitution itself distinguishes between "interstate commerce" and "Indian commerce,"and the distinction has not been lost on this Court in the past. For reasons of history and public policy, the Indian commerce clause has never been construed to impose the same restrictions on Indian tribal activities that are imposed on the states by the interstate commerce clause. The petitioners have failed to heed the reason for this important distinction.

The Commerce Clause is three clauses in one. In its most familiar form, the Commerce Clause defines the

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[46] *Merrion v. Jicarilla Apache Tribe, supra,* 617 F.2d at 544-46.

[47] Amoco Brief, p. 31.

respective roles of federal and state governments in regulating "Commerce . . . among the several States . . . ." The interstate commerce clause places limits upon the sovereign regulatory powers of the states in areas of commercial conduct extending beyond state boundaries. Its chief purpose was to end "anarchy and commercial warfare between states" that grew so severe after the Revolutionary War that it "came 'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 533 (1949) (quoting from Story, *The Constitution* §260). Under interstate commerce clause analysis, a state may not impose a tax that affects commerce unless the tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). This is the test the petitioners have applied to the Jicarilla severance tax in this case.

But this approach is based on a false premise – that all Commerce Clause cases are to be analyzed under the same standard, regardless of the type of commerce involved or the purpose of the Constitutional provision granting Congress ultimate authority to regulate that type of commerce. Traditional interstate commerce analysis does not apply when the "commerce" involved is foreign commerce instead of interstate commerce. In *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), this Court rejected the notion that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved," and required "more extensive constitutional inquiry" where states seek to tax foreign commerce. 441 U.S. at 446.

Interstate commerce and foreign commerce are not the only categories of commerce given Constitutional status.

The Commerce Clause also grants Congress the power to regulate "Commerce . . . with the Indian Tribes," a grant of authority with a history and purpose all its own. Under the Articles of Confederation, primary jurisdiction over the commercial activities of Indian tribes within state boundaries had been given to the states. In *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and the Constitution. It observed that in the Articles, "two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." 93 U.S. at 194. The Court concluded:

> [O]f necessity, these limitations rendered the power of no particular value. This was seen by the Convention which framed the Constitution . . . . The only efficient way of dealing with the Indian Tribes was to place them *under the protection of the General Government.*

Id. (emphasis added).

State control over Indian commerce under the Articles was replaced by a Constituional provision that "provid[ed] that intercourse and trade with the Indians should be carried on solely under the authority of the United States." *Id.*[48] From the beginning, then, Indian commerce was perceived as something separate and distinct from other forms of commerce, as Chief Justice Marshall stated in one of the earliest analyses of the Commerce Clause:

> In this clause, [Indian tribes] are clearly contra-distinguished, by a name appropriate to them-

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[48] *See also* J. NOWAK, *et al.*, CONSTITUTIONAL LAW 131 (1978); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 467-68 (1941).

> selves, from foreign nations, as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, *neither can the application distinguishing either of the others be, in fair construction, applied to them.*

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (emphasis added).

The Indian commerce clause serves a purpose different from the interstate commerce clause. It benefits a specifically identified group – members of Indian tribes – by interposing the protective jurisdiction of the federal government between tribes and state governments. *Cf. Morton v. Mancari,* 417 U.S. 535, 552 (1974). This unique purpose must inform and guide analysis under the Indian commerce clause. That clause does not impose any inherent limitations on the commercial power of *Indian tribes,* as petitioners seem to believe; rather, it places a limitation on the authority of *states* to interfere in the exercise of sovereign tribal power. It would be ironic indeed if the Indian commerce clause were now allowed to become the tool for restricting that sovereign power.

The Constitution's framers were not concerned with limiting tribal authority to tax. Their design was to foster Indian commerce under federal protection and save it from state-imposed restrictions or infringements. The traditional interstate commerce clause analysis urged by petitioners is just as inappropriate in the context of tribal commerce as it was deemed to be in *Japan Line, supra,* in the context of foreign commerce.

Proper interpretation of the Indian commerce clause is only possible when the underlying purpose of that clause is understood: to benefit tribes, not states. To argue, as petitioners do, that limitations on tribal power

are somehow to be inferred from the existence of the Indian commerce clause, even when Congress has made no determination that such limitations are appropriate, is to misapply a constitutional provision whose basic purpose is to safeguard, rather than to limit, Indian tribal rights.

CONCLUSION

For all of these reasons, the decision of the Tenth Circuit Court of Appeals should be affirmed in all respects and the petitions for a writ of certiorari should be dismissed.

Respectfully submitted,

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No. 80-11

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In The

Supreme Court of the United States

—o—

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS; et al.,

Petitioners,

vs.

JICARILLA APACHE TRIBE; et al.,

Respondents.

—o—

On Certiorari To The Tenth Circuit Court of Appeals

—o—

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN SUPPORT OF PETITIONERS

—o—

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No. 80-11

In The

Supreme Court of the United States

J. GREGORY MERRION AND ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS; et al.,

Petitioners,

vs.

JICARILLA APACHE TRIBE; et al.,

Respondents.

On Certiorari To The Tenth Circuit Court of Appeals

BRIEF OF AMICUS CURIAE STATE OF MONTANA IN SUPPORT OF PETITIONERS

Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

INTEREST OF AMICUS CURIAE

The State of Montana has within its borders seven large areas of land set aside as Indian reservations.[1]

1. There are approximately 5,148,000 acres of tribal land and allotted individual land, comprising 5.5% of the total land within Montana. T. Taylor, The States & Their Indian Citizens 179 (1972).

Most of these reservations overlie massive amounts of mineral, oil, gas, and coal resources which the tribes have recently begun to develop.

The State of Montana imposes a coal severance tax and a gross proceeds from coal tax upon all coal severed from the ground in Montana.[2] The Crow Tribe of Indians has challenged application of the Montana taxes to non-Indian coal producers mining off-reservation coal in which the Tribe has a beneficial interest. The litigation is currently pending before the Ninth Circuit Court of Appeals. *Crow Tribe of Indians v. State of Montana, et al.*, 9th Cir. No. CA-79-4321. The Crow Tribe has also enacted a tribal coal severance tax on coal mining on the Crow Reservation, although there is not yet on-reservation coal mining. The Tribe is attempting to obtain approval from the Secretary of the Interior to impose a severance tax on coal in which the Tribe owns a beneficial interest but which lies outside the exterior boundaries of the Crow Reservation.[3]

The State of Montana also imposes various taxes on oil and gas production within the State.[4] The Blackfeet

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2. Montana Coal Severance Tax Act, Montana Code Annotated, 1979 (hereafter cited as "MCA"), §§ 15-35-101 through 15-35-110, and Montana Gross Proceeds From Coal Tax Act, §§ 15-23-701 through 15-23-704, MCA.

3. *See*, Solicitor's Memorandum, No. M- ———, "Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes" (October 13, 1976).

4. The Oil and Gas Conservation Tax, § 82-11-131, MCA; the Resource Indemnity Trust Tax, § 15-38-104, MCA; the Oil and Gas Severance Tax, § 15-36-101, MCA; and, the Oil and Gas Net Proceeds Tax, §§ 15-23-601, *et seq.*, MCA.

Tribe of Indians has challenged imposition of these taxes on oil and gas production by non-Indian lessees of the Tribe, and the litigation is currently pending before the United States District Court for Montana. *Blackfeet Tribe of Indians v. State of Montana, et al.*, No. CV-78-61-GF (D. Mont.). An issue raised by the Tribe's Complaint is whether the 1938 Indian Mineral Leasing Act, Ch. 198, 52 Stat. 347, 25 U. S. C. §§ 396a through 396f, implicitly repealed prior Indian mineral leasing acts.[5]

The State of Montana is also a Petitioner before this Court in *State of Montana, et al. v. United States of America, et al.*, No. 79-1128 (*cert. granted*, April 13, 1980). An issue present in that case is the extent of tribal power over non-Indians who are lawfully within the exterior boundaries of the Crow Indian Reservation.

Thus, several issues of major importance which are currently confronting the State of Montana are presented in this case for review. The Tenth Circuit's erroneous decision below, if allowed to stand, will have a detrimental affect on the State of Montana, its citizens, and the litigation described above.

Amicus will limit its argument to the questions which most directly affect it: the authority of Indian tribes to tax nonmembers and the authority of states to tax mineral production on Indian lands.

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5. For example, the Act of February 28, 1891, Ch. 383, Sec. 3, 26 Stat. 795, 25 U. S. C. § 397; the Act of May 29, 1924, Ch. 210, 43 Stat. 244, 25 U. S. C. § 398; and, the Act of March 3, 1927, Ch. 299, 44 Stat. 1347, 25 U. S. C. §§ 398a through 398e.

ARGUMENT

I. The Jicarilla Apache Tribe has no authority to exact funds from petitioners, except insofar as such payments are obtained through the Tribe's rights as lessor.

The Jicarilla Apache Tribe has no power or authority to exact funds from mineral lessees of the Tribe, except pursuant to the lawful lease terms binding the lessees and the Tribe. The facts present in this case are, quite simply, that the lessor executed several mineral leases with Petitioners, all of whom are mineral producers. Each lease provided for specific compensation to the lessor—rents, royalties, and cash bonuses. Subsequently, the lessor sought to exact additional compensation from the lessees in the form of a "severance tax." The lessees have sought a declaratory judgment and an injunction to prohibit enforcement of the lessor's unilateral decision to charge the lessees more than is provided by the terms of the lease between the parties. The lessor is an Indian tribe and the lessees are not members of the Tribe. *Amicus* submits that the lessor's status as a Tribe does not alter the outcome of this contractual dispute.

The Jicarilla Apache Tribe asserts its ability to tax Petitioners is one of its inherent sovereign powers. While recent decisions of this Court "tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes," *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164, 172 (1973), there can be no doubt that tribal sovereignty exists in some form and to limited extents. Of course, "sover-

eignty" is a misnomer for the doctrine because of its primary limitations: powers may be lost through treaty provisions and express federal statutes, and Indian tribes are prohibited from exercising powers which are inconsistent with tribal status as aggregations of wards of the United States. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978).

There is no contention that the Jicarilla Apache Tribe's asserted power is the subject of any express treaty provision or federal statute. No such power was expressly reserved by the Tribe and no such power has been expressly conferred on the Tribe by Congress. *Cf., United States v. Mazurie,* 419 U.S. 544 (1975). The question is whether the power to tax, possessed by true sovereigns, has been the subject of implicit divestiture because the Petitioners herein are not members of the Jicarilla Apache Tribe.[6]

Tribes possess some sovereign powers over internal tribal affairs affecting tribal members. *United States v. Wheeler,* 435 U.S. 313 (1978); *Talton v. Mayes,* 163 U.S. 376 (1895). *See, Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). But that is not the case here. The livelihood of nonmembers is what the Jicarilla Apaches assert power to control. This Court has explained that the

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6. Petitioners have argued in their Petition for Writ of Certiorari, pp. 11-12, that the 1848 Treaty of Guadalupe Hidalgo resulted in a total divestiture of all sovereignty held by Indian groups within the territory annexed by the United States pursuant to that Treaty. The argument has merit for areas subject to the Treaty, as Judge Seth's dissent below confirms. However, because of the possible far-reaching consequences of this Court's decision, the sovereignty analysis applicable outside the area subject to the 1848 Treaty is presented.

> areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.
>
> *United States v. Wheeler, supra,* 435 U. S. at 326.

Oliphant v. Suquamish Indian Tribe, supra, holds that Indian tribes have no inherent power to try, convict, and punish nonmembers of the tribe for violations of tribal law. Tribal advocates would have the courts narrowly construe this decision to not apply to all public laws of the tribe, or to affect only those situations where bodily imprisonment is the only prescribed punishment for violating tribal laws. But a complete reading of *Oliphant* shows that these restrictions are not warranted. Citing this Court's earliest pronouncement concerning the status of Indian tribes, *Oliphant* emphasized that tribes have no governmental powers over nonmembers. *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 209, citing *Fletcher v. Peck,* 10 U. S. (6 Cranch) 87, 147 (1810).

By asserting the power to tax non-Indians, the Tribe is attempting to exercise governmental power over individuals and entities who are not, and can never become, members of the Tribe. Such an assertion directly conflicts with the holding in *Oliphant.*

The limitations on tribal powers result from the tribe's dependent status within the territorial sovereignty of the United States. Tribes do not possess the power or the "freedom independently to determine their external relations" with nonmembers, *United States v. Wheeler, supra,* 435 U. S. at 326, because "their exercise of separate power is constrained so as not to conflict with the interests of [the United States'] overriding sovereignty." *Oliphant v.*

Suquamish Tribe, supra, 435 U. S. at 209. And, as *Oliphant* explained,

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.
>
> *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 210.

Of course, an ordinary criminal prosecution, as was involved in *Oliphant,* is "*an* important manifestation" of the power to restrict the liberties of nonmembers. *Oliphant v. Suquamish Indian Tribe, supra,* 435 U. S. at 210. But it is not the only way. There are other ways, such as the extortion by which the Jicarilla Apache Tribe is attempting to exact the taxes in this case. Even if a technical distinction can be made between one's personal liberty and one's personal property and livelihood, there can certainly be no argument that the United States does not manifest equally "great solicitude" for the property rights of its citizens.

The question here is not whether Petitioners can financially afford the additional payments to the Jicarilla Apache Tribe. They probably can. Rather, the question is whether nonmembers of a tribe *should* be forced to bear involuntary, unilaterally-imposed, financial burdens, particularly after executing valid leases which define the terms of the relationship between the nonmember Petitioners and the Respondent Tribe.

There is no significant distinction between the facts of *Oliphant* and the facts of this case. They both involve tribal power over nonmembers of the tribe, and the further

this case is allowed to progress, the closer and closer the two cases become in all particulars. Under *Oliphant,* the Jicarilla Apache Tribe may not imprison Petitioners for refusing to pay the exaction. Can it be argued that *Oliphant* was intended to permit tribes to seize all of the nonmember's on-reservation property as ransom to insure compliance with tribal law, particularly when the nonmembers were lured onto the reservation under valid leases, and when the nonmembers have no appeal, no remedy, and no voice in tribal government?

The Jicarilla Apache Tribe has certain powers and rights in its relationships with these non-Indian Petitioners, but that power clearly does not have as its basis "sovereignty." Rather, as the courts have recognized for nearly a century, it is the power of a beneficial landowner.

In *Morris v. Hitchcock,* 194 U. S. 384 (1904), a Chickasaw permit fee imposed on non-Indians was upheld because the Tribe had reserved in its treaties with the United States "the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory." This power was not based on any sovereign governmental authority, but rather on proprietary rights retained in the applicable treaties to exclude nonmembers from tribal lands.

Maxey v. Wright, 54 S. W. 808 (Ind. Ter., 1900), *aff'd,* 105 Fed. 1003 (1900), and *Buster v. Wright,* 135 Fed. 947 (8th Cir. 1905), both presented situations strikingly similar to that of *Morris, supra.* The courts were dealing with license fees, not ordinary taxes. The truly optional nature of the fees, paid in exchange for the privilege of pursuing certain businesses within the tribe's territory, was em-

phasized in *Buster v. Wright, supra,* 135 Fed. at 949. The Eighth Circuit also recognized some of the pertinent limitations on the Tribe's rights:

> The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been *destroyed or limited* by act of Congress or *by the contracts of the Creek tribe itself.* (Emphasis supplied.)
>
> *Buster v. Wright, supra,* 135 Fed. at 950.

The Jicarilla Apache Tribe relies heavily on two Eighth Circuit decisions. Both of those decisions purported to follow *Buster v. Wright, supra, Maxey v. Wright, supra,* and, *Morris v. Hitchcock, supra.* However, the Circuit Court overlooked its own precedents in *Iron Crow v. Oglala Sioux Tribe,* 231 F. 2d 89, 98-99 (8th Cir. 1956), and appeared to uphold a tribal tax or fee solely on the basis of inherent tribal sovereignty. The decision, therefore, relied upon certain decisions to reach a conclusion which the earlier decisions reject. This decision was not reviewed by the Supreme Court. Instead, the Circuit repeated its error in *Barta v. Oglala Sioux Tribe,* 259 F. 2d 553 (8th Cir. 1958), *cert. denied,* 358 U. S. 932 (1959).

The mistaken conclusion of law in *Iron Crow* and *Barta* is the only support for the Tenth Circuit's decision in this case. The "tribe's retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." *Oliphant, supra,* 435 U. S. at 208. The Tenth and Eighth Circuits have not applied the relevant limitation on tribal sovereignty—that the tribe lacks the power to govern nonmembers—and so the Tenth

Circuit's decision is incorrect in light of recent decisions by this Court.[7]

To summarize, the tribal sovereignty doctrine does not permit the Jicarilla Apaches to impose this tax on these Petitioners because such a power would be inconsistent with the status of American Indian tribes. The asserted taxation power conflicts with the interests of the United States in protecting its non-tribal citizens' rights from unwarranted intrusions. Tribal rights in this case, as recognized by the courts, are proprietary rights permitting the Tribe to condition the terms upon which non-Indians may enter the reservation. And those proprietary rights were fully exercised by the Jicarilla Apache Tribe when it voluntarily leased its mineral interests for the agreed upon valuable consideration.

II. Regardless of any tribal ability to exact funds from nonmember lessees, the various states possess the power to tax mineral production on Indian reservations.

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7. This Court recently alluded to the question here in *Washington v. Confederated Tribes of the Colville Reservation*, — U. S. —, 65 L. Ed. 2d 10, 28-29 (1980). Of course, *Colville* presented questions of state taxation—not tribal taxation—of non-Indians on reservations. The Court recognized that the tribal taxation present was not dispositive of the case by explaining that the Opinion's dicta was "probably" correct. Further, there is a very real difference in terms of a non-Indian's options, as emphasized in *Buster v. Wright, supra*, 135 Fed. at 949, between a one-time purchase of cigarettes and the on-going and capital intensive business of producing minerals pursuant to valid leases.

Part II of this Brief is submitted to this Court for two purposes. First, to apprise this Court of the substantial interest the State of Montana has not only in the eventual outcome of this case, but also in the language used by the Court in reaching its decision. Second, Amicus submits that the existence of state taxation authority over all mineral production on all Indian lands is the best evidence available showing Congress' understanding of the respective taxation powers, or lack thereof, of the states and tribes.

A. States Have the Power to Tax Non-Indian Lessees of Indian Lands Producing Minerals on Indian Reservations.

The main issue in this case is whether the Jicarilla Apache Tribe has the inherent sovereign power to tax non-Indians producing oil and gas on the Jicarilla Reservation under leases from the Tribe which predate enactment of the Tribe's taxation code. The right of the State of New Mexico to tax Petitioners is in issue to the extent that such right was challenged by the Respondent to buttress its argument that the Tribe possesses exclusive taxation authority.

States possess extensive power to tax non-Indians within the boundaries of Indian reservations. States may impose income taxes on non-Indian lessees of Indian lands. *Helvering v. Mountain Producers Corp.*, 303 U. S. 376 (1938) [overruling *Gillespie v. Oklahoma*, 257 U. S. 501 (1922)]. States may also impose sales taxes on sales to non-Indians on reservations, even when the seller is an Indian or Indian organization. *Moe v. Confederated*

Salish and Kootenai Tribes, 425 U. S. 463 (1976). Whenever property on a reservation passes from Indian to non-Indian ownership, it becomes subject to state taxation. *Choctaw, O. & G. R. R. v. Mackey*, 256 U. S. 531 (1921).

It is well established that lessees of Indian trust land are subject to non-discriminatory state taxes as long as no Indian or tribe is liable for payment and the tax creates no encumbrance on trust land or Indian property. *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342 (1949). *See also, Ft. Mojave Tribe v. San Bernardino County*, 543 F. 2d 1253 (9th Cir. 1976); *Agua Caliente Band v. County of Riverside*, 442 F. 2d 1184 (9th Cir. 1971), *cert. denied*, 405 U. S. 933 (1972). In *Thomas v. Gay*, 169 U. S. 264, 273 (1898), it was noted that "a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax on the lands or privileges of the Indians," so this Court concluded that the state may tax cattle of non-Indians grazing on tribal lands under a lease from the Indians.

Thus, many state taxes have been held to apply within Indian reservations, most frequently when the tax is exacted from a non-Indian. Each state tax, as it may be questioned in this context, must be carefully scrutinized. If the legal incidence of the tax falls upon a non-Indian, the tax must be upheld as a valid exercise of the state's rights to tax citizens within its territory. This remains the rule even if the measure of the tax is the value of the property leased from an Indian tribe, *Thomas v. Gay*, *supra*, even if the tax results in economic detriment to an Indian tribe, and even if the subject matter is identical to that purportedly taxed by an Indian tribe. *Washing-*

ton v. Confederated Tribes of the Colville Indian Reservation, — U. S. —, 65 L. Ed. 2d 10 (1980).

B. Congress Has Provided That States May Tax Indian Interests in Mineral Production on Indian Reservations.

In 1924, Congress enacted 25 U. S. C. § 398 (hereafter "the 1924 Act") which specifically authorized the states to tax all mineral production on treaty reservations. In 1927, Congress extended this specific taxation authorization to Executive Order Indian reservations such as the Jicarilla Apache's by enacting 25 U. S. C. § 398(c) (hereafter "the 1927 Act"). These authorizations apply to Indian interests in mineral development, such as rents and royalties, as long as the taxes do not become a lien against the land or other property of the Indians.[8] Since these taxing provisions are not limited by their terms to leases or operations pursuant to any specific statutory scheme, they apply equally to leases given under the 1924 Act, the 1927 Act, or 25 U. S. C. §§ 396a-396f (hereafter "the 1938 Act"). Unless 25 U. S. C. § 398(c) has been repealed by the 1938 Act, § 398(c) clearly authorizes the State of New Mexico to impose its taxes on oil and gas production on the Jicarilla Apache Reservation.

The question, then, is whether the 1938 Act, by its extensive procedural leasing requirements or by its general repealing clause, repealed the explicit tax authoriza-

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8. As discussed in Part II(A) of this Brief, the states have always had the power to tax non-Indians' mineral production on Indian reservations. The 1924 and 1927 Acts extend the states' taxing authority and allow states to tax the royalty interests of Indian tribes.

tions included in the 1924 and 1927 Acts. According to the customary and applicable rules of statutory construction, no such repeal occurred. The repealing effect of statutes must be either express or by necessary implication. *I Sutherland On Statutory Construction* (3rd Ed., 1943), Sec. 2013, page 467. There is no clause in the 1938 Act which expressly repeals prior taxing provisions. If those taxing provisions were repealed by the 1938 Act, the repeal must have been accomplished by implication.

There are certain rules of statutory construction which control this case. First, there is a strong legal presumption against repeals by implication. *United States v. Borden Co.*, 308 U. S. 188, 198 (1939); *Frost v. Wenie*, 157 U. S. 46, 58 (1895). In *United States v. Greathouse*, 166 U. S. 601 (1877), the Supreme Court said:

> But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and they are not *absolutely irreconcilable*, effect should be given, if possible, to both of them.
>
> 166 U. S. at 605. (Emphasis supplied.)

It is also well settled that the courts will not use a strained construction of a statute in order to find an inconsistency. *United States v. Noce*, 268 U. S. 613 (1925). Inconsistency is never presumed, and will not be found if *any other reasonable construction* exists. *Frost v. Wenie, supra.*

It must be pointed out what is not involved in this case. First, a traditional Indian tax exemption is not in issue because that exemption was expressly stricken by the 1924 and 1927 Acts. Thus, the canon prohibiting implied repeal of Indian tax exemptions, *see, Bryan v. Itasca*

County, 426 U. S. 373 (1976), and *Choate v. Trapp,* 224 U. S. 665 (1912), is not applicable. Second, this case does not involve ambiguous statutes. The 1924 and 1927 Acts specifically allow taxation and the 1938 Act is totally silent on taxation. Thus, another canon of construction requiring that ambiguous expressions be resolved in favor of Indians, *see, Bryan v. Itasca County, supra,* is also inapplicable.

The usual and customary rules of statutory construction are not obviated merely because the Jicarilla Apache Tribe is a party in this action. Since the passage of the 1927 Act, the Jicarilla Apache Tribe has been in the same position as non-Indian taxpayers. To claim an exemption from a New Mexico tax, the Tribe must cite an express statutory authority proving that it is entitled to tax-free status. The argument that the express provision of the 1927 Act was repealed by the silence of the 1938 Act simply does not suffice to show that the Tribe is entitled to be exempt from New Mexico taxes.

When the appropriate rules of statutory construction are used, it is apparent that the 1924 and 1927 Acts were not repealed by the 1938 Act. There is no provision in the 1938 Act which mentions in any way the states' authority to impose taxes relating to mineral production on Indian reservations. Considering all three Acts together, only the 1924 and 1927 Acts relate to taxation. There is no inconsistency on this point. The 1938 Act could not have repealed the 1924 and 1927 Acts by implication.

Respondents argued below that the general repealing clause and the "comprehensiveness" of the 1938 Act

repealed the taxing provisions of the 1927 Act. These arguments are erroneous, misleading, and even mutually inconsistent.

> An express general repealing clause to the effect that all inconsistent enactments are repealed, is in legal contemplation a nullity. . . . If its conclusion is more than mechanical verbiage, it is more often a detriment than an aid to the establishment of a repeal, for such clause is construed as an express limitation of the repeal to inconsistent acts.
>
> *I Sutherland, supra,* at 466-468.

In *Hess v. Reynolds,* 113 U.S. 73, 79 (1885), this Court construed an identical clause. It was held that such a clause "implies very strongly that there may be acts on the same subject which are not thereby repealed." The inclusion of such a general repealing clause in the 1938 Act "indicates plainly the intention of Congress to leave in force some portions of former acts relative to the same subject matter." *United States v. Henderson,* 78 U.S. (11 Wall.), 652, 656 (1870).

To the extent that the repealing clause of the 1938 Act means anything at all, it means that the Act was *not* intended to be comprehensive to the exclusion of all existing statutes relating to mineral leasing of unallotted Indian lands. Congress well knew how to repeal the taxing provisions contained in the 1924 and 1927 Acts. Had Congress intended to create a tax exemption, it would have done so as it always does—expressly, and not by implication.

The historical context of the 1938 Act confirms that Congress did not repeal the 1924 and 1927 Acts by implication. The 1930s were a time of heightened activism

among Indian tribes, the Congress, and the courts. Preceding 1930, two events formed the base for what was to develop during the decade: first, the United States Supreme Court had applied the "federal instrumentality" doctrine to oil and gas production on Indian lands, thereby prohibiting state taxation, *Gillespie v. State of Oklahoma,* 257 U.S. 501 (1922), and second, Congress had expressly rejected that doctrine as the Court applied it to Indian lands by passing the 1924 and 1927 Acts. In 1934, Congress approved the Indian Reorganization Act.[9] In 1936, this Court decided *British-American Oil Co. v. Board of Equalization,* 299 U.S. 159 (1936), holding that oil and gas production on Indian lands was subject to state taxation. On March 7, 1938, this Court expressly overruled *Gillespie, supra,* and the federal instrumentality doctrine. *Helvering v. Mountain Producers Corp., supra.* Slightly more than two months later, on May 11, 1938, Congress passed a mineral leasing act which was silent on the subject of taxation.

These events indicate that Congress intended to leave the authorizations of the 1924 and 1927 Acts intact. Under applicable rules of statutory construction, however, congressional intent to leave a tax authorization intact need not be found. What is important is Congress' lack of legislation expressly creating an exemption, because absent express creation of a tax exemption, legislative intent

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9. 25 U.S.C. §§ 461, *et seq.*

has no affect.[10] Congress was aware of its then-in-vogue Indian policy; it was well aware of the 1924 and 1927 Acts and the decisions of this Court giving those Acts a specific effect; Congress was well aware that the courts would, under customary rules of statutory construction, continue to give the 1924 and 1927 Acts the meaning given them by the Supreme Court unless Congress expressly rejected that specific effect in subsequent legislation; Congress was well aware of the ease with which a tax exemption can be created; and it was well aware that the 1938 Act contained no such exemption.

CONCLUSION

Amicus has not located any definitive holding on the question of whether New Mexico's taxing authority is exclusive in this case. *Amicus* contends that such authority is exclusive on the ground that the Tribe lacks the sovereign power to tax non-Indians lawfully on the reservation pursuant to leases with the Tribe, as argued in Part I of this Brief. As shown in Part II of this Brief, Congress vested taxing authority over tribal mining interests in the states, and *Amicus* submits that this demonstrates the historical assumption that tribal taxation

10. Nevertheless, such lack of intent is demonstrated as much as is possible by the Department of Interior's letter transmitting the 1938 Act to the House of Representatives, see, Cohen, Handbook of Federal Indian Law (1942), p. 328, wherein the existence of state taxation is not even mentioned as a problem intended to be remedied by the 1938 Act.

of non-Indians is not a retained sovereign power of tribes because such power would be inconsistent with tribal status.

The opinion of the Tenth Circuit Court of Appeals should be reversed. The Jicarilla Apache Tribe does not possess the inherent sovereign power to tax non-Indians because such a power is inconsistent with the status of dependent Indian tribes. Only the State of New Mexico possesses the power to tax mineral production by these Petitioners.

DATED this 20th day of November 1980.

Respectfully submitted,

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

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Respondents,

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

and

BRIEF OF THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Foundation states:

1. Mountain States Legal Foundation (the Foundation), is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advoca-

cy of the values and concepts of individual liberties and economic freedom. The Foundation takes an interest in questions of law having a national scope and especially those that have a direct impact in the Mountain States region, including the State of New Mexico where the instant case arose.

2. The issue invoked in this case — the nature and extent of Indian tribal sovereignty over nonmembers of the tribe — has far-reaching ramifications for all nonmembers who engage in on-reservation activities. Recent decisions of this Court have partially addressed, but left unresolved this critical issue. An examination of these far-reaching ramifications is crucial to a well-reasoned explication of the tribes' sovereign power. As *amicus curiae,* the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and that underscore the need for clarification of the nature and extent of Indian tribal sovereignty.

3. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties hereto and thus may not be adequately addressed by the existing parties.

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that its motion for leave to file the annexed brief *amicus curiae*, be granted.

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INTEREST OF AMICUS

Mountain States Legal Foundation (the Foundation) is a nonprofit, membership public interest legal foundation. The Foundation is supported entirely by donations from its members and is dedicated to the legal advocacy of the values and concepts of individual liberties and economic freedom. As *amicus curiae,* the Foundation seeks to bring before this Court fundamental considerations which form the basis of individual liberties and that underscore the need for clarification of the nature and extent of Indian tribal sovereignty. These considerations, while directly applicable to the instant case, transcend the specific interests of the parties hereto and thus may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

Recent decisions of this Court, especially *Washington v. Confederated Tribes of the Colville Indian Reservation,* ..... U.S. ....., 100 S.Ct. 2069 (1980), have partially addressed, but left unresolved important issues which impact all nontribal members who engage in on-reservation activities. These issues arise from statements by this Court that impute a degree of sovereignty to Indian tribes which, if carried to their logical extreme, will effectively create separate enclaves within this country that exercise all but a few of the attributes of statehood, but without the traditional safeguards to protect individuals from governmental excesses. Consequently, there is a need for clarification by this Court of the exact nature and extent of sovereignty that Indian tribes possess.

The instant case affords an excellent opportunity to establish safeguards and clarify this confusing and contradictory area of the law. It involves a unilateral modification of a contract via taxation which the Tenth Circuit upheld as a valid exercise of inherent sovereignty. If, as an attribute of inherent sovereign power, the tribes are allowed to im-

pose such taxes directly upon nonmembers, the federal interest of ensuring representative government is implicated. Said implication occurs due to the fact that nonmembers do not have, and generally cannot obtain, any voice in tribal government. This case also underscores the conflict between the broad sovereignty claimed by the Jicarilla Apache Tribe and freedom of contract. The ordinance in question drastically alters the preexisting contractual rights and obligations between the tribe and petitioners and thereby violates the liberty and property interests of the petitioners. Finally, this Court must consider whether the type of energy development taxation imposed by the Jicarilla Apache Tribe is compatible with the congressionally mandated national energy policy. The relationship between Indian tribal sovereignty and each of these overriding federal interests will be explored in detail after an examination of the existing contradictory nature of the Indian tribes' sovereignty.

ARGUMENT

I. STATEMENTS BY THIS COURT REGARDING THE NATURE AND EXTENT OF INDIAN TRIBAL SOVEREIGNTY ARE INCONSISTENT AND CONTRADICTORY

Originally, the Indian tribes were truly sovereign nations. However, as the settling of this continent progressed, any claim to absolute sovereignty was extinguished by discovery, conquest, and cession. *The Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823). Consistent with this process of discovery and conquest is the conclusion that the tribes ceased to be regarded by the United States as foreign nations. The fact that the Indian tribes are not foreign nations is evidenced by the separate delineation in the Commerce Clause which empowers Congress "[t]o regulate commerce *with foreign nations,* and among the several States, *and*

with the Indian tribes." U.S. Const. art. I, § 8, cl. 3 (emphasis added). Even though the tribes were not considered foreign nations, they were, however, separate entities dealt with by Congress through the treaty power until 1871. *See* Act of March 3, 1871, 25 U.S.C. § 71 (1976).

By the end of the nineteenth century, this Court characterized the status of the Indian tribes in the following manner:

> [T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these. (emphasis added).

United States v. Kagama, 118 U.S. 375, 379 (1886). Thus, the tribes have not been equated with sovereign nations *per se.* This less-than-sovereign status is underscored by the tribes' inability either to dispose of their own land without the United States' approval or to enter into any type of relations with foreign powers. *See, The Cherokee Nation v. Georgia, supra; Johnson v. M'Intosh, supra.* Such quasi-sovereignty was further diluted by the Act of June 2, 1925, *recodified at* 8 U.S.C. § 1401 (b) (Supp. III 1979), which made all Indians citizens of the United States.

Consistent with these historical pronouncements is this Court's recent characterization of the nature of tribal sovereignty in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978):

> [T]he tribe's retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals

> recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsisent with their [dependent] status."* (emphasis in original).

Id. at 208 (quoting *Oliphant v. Schlie,* 544 F.2d 1007, 1009 (9th Cir. 1976)). Additionally, the "inconsistent with their status" component of this potential limitation was interpreted in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 100 S.Ct. at 2081, to encompass actions which are at odds with an overriding federal interest. Therefore, the tribes are indeed very limited in the type of sovereignty that they can claim.

One aspect of sovereignty which the tribes consistently have been allowed to exercise is that of self-rule. *E.g., United States v. Wheeler,* 435 U.S. 313 (1978) (allowing the tribes to exercise criminal jurisdiction over tribal members concerning crimes on reservation land); *Williams v. Lee,* 358 U.S. 217 (1959) (allowing the tribes to enforce tribal law in their own courts); *United States v. Quiver,* 241 U.S. 602 (1916) (allowing the tribes to regulate domestic relations among tribal members); *Jones v. Meehan,* 175 U.S. 1 (1899) (allowing the tribes to prescribe rules for inheritance of property); *Roff v. Burney,* 168 U.S. 218 (1897) and *United States ex rel. Mackey v. Coxe,* 59 U.S. (18 How.) 100 (1855) (allowing the tribes the power to determine tribal membership). This inward-looking sovereignty is quite consistent with the dependent status of the tribes *vis-a-vis* the United States Government. By permitting this degree of self-governing sovereignty, the tribes have retained their separate cultural existence, complete with their own customs, language, and heritage.

However, there does exist a line of authority, cited by this Court in *Colville,* 100 S.Ct. at 2081, which arguably extends a tribe's sovereignty beyond the self-governing type

of sovereignty as discussed above to encompass broad authority to tax nonmembers of the tribe. *Morris v. Hitchcock,* 194 U.S. 384 (1904); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956); *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906). The Tenth Circuit's opinion below relied upon, and indeed expanded, these cases in upholding the Jicarilla tribal ordinance. 617 F.2d 537, 543-44 (10th Cir. 1980). In so doing, the Tenth Circuit recognized that the proper characterization of these cases has been a matter of some dispute. *Id.* at 543. Therefore, a brief discussion of these ambiguous holdings will highlight the need for clarification of the nature and extent of inherent tribal power to tax.

In *Buster,* non-Indians with businesses on the Creek Reservation brought suit against a variety of federal and tribal officials to enjoin them from reporting plaintiffs for deportation from the Indian territory unless plaintiffs paid taxes as prescribed by the law of the Creeks for the privilege of doing business within the Creek Nation. The court noted in passing that the "tax" at issue in *Buster* was actually more in the nature of a private contractual condition than an actual tax. 135 F. at 949. When viewed in this manner, *Buster* is consistent with the uncontestable observation that the tribes, as any other landowners, can contractually condition entry upon their land. However, the opinion of the Eighth Circuit referred to the Creek tribe in absolute terms as a nation, and thus broadly held that the tax was a legitimate exercise of sovereignty by the Creek Nation.

The Eighth Circuit subsequently broadened its sovereignty analysis in the 1956 decision of *Iron Crow, supra.* In that case, Thomas Iron Crow, an enrolled member of the Oglala Sioux Tribe who possessed allotted land in the Pine Ridge Reservation, leased some of his land in the Reservation for grazing purposes to a nonmember of the Oglala Sioux Tribe. The tribal council assessed a tax against Iron

Crow's lessee for the privilege of grazing stock on the land within the Reservation, thereby precipitating the lawsuit. Noting that the power to tax had never been formally divested by any affirmative act of Congress, the Eighth Circuit felt that the tribe retained this inherent aspect of sovereignty.

It should be noted that both of these Eighth Circuit decisions predate the recognition by this Court of limitations on tribal sovereign power arising from actions which are inconsistent with the tribes' dependent status or which conflict with an overriding federal interest. *See, Colville, supra; Oliphant, supra.* Therefore, reliance upon the Eighth Circuit's analysis is inappropriate.

A Supreme Court case that focused on aspects of this sovereignty question was *Morris v. Hitchcock, supra.* In *Morris,* the Chickasaw tribal council imposed an annual privilege or permit tax on livestock grazing within the Chickasaw Nation. The Supreme Court upheld this permit tax, not on sovereignty grounds, but rather under the general rubric of federal approval pursuant to treaty coupled with private property concepts. 194 U.S. at 389-393.

If the above opinions are characterized as merely condition of entry cases, no conflict with fundamental concepts is presented. Every private property owner can condition entry onto his land as a function of his proprietary rights. The Foundation does not contest the proprietary right of the tribes to attach contractual conditions upon the entry and use of their land. Nor is it contested that specific treaty provisions, such as found in *Morris,* may grant this type of power. However, when the tribes enact an ordinance which is purportedly a function of sovereign power, a different situation is created. Proprietary rights are typically exercised in a voluntary, contractual situation where each party is free to bargain with the other. Compliance with sovereign power, on the other hand, is mandatory. When this mandatory compliance is coupled with the lack of a voice

in that government, it is unjustly coercive. The concern of this *amicus* is the impact of amorphous concepts of inherent sovereignty over nonmembers of the tribe springing not from treaties or specific statutes, but rather from mere historical existence.

The concept of inherent sovereignty as an attribute of historical existence was recently addressed in *Washington v. Confederated Tribes of the Colville Indian Reservation, supra.* In *Colville,* a tribal tax upon cigarettes sold in reservation smoke shops was upheld even as it applied to nonmembers of the tribe. In the course of upholding this tax, the Court implied in broad dicta that any tribal taxation of nonmembers is proper as a fundamental attribute of sovereignty:

> The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.
>
> . . . .
>
> Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity. *Buster v. Wright,* 135 F. 947, 950 (CA8 1905), appeal dismissed, 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (CA8 1956); cf. *Morris v. Hitchcock,* 194 U.S. 384, 393 (1904). No federal statute cited to us shows any congressional departure from this view. To the contrary, authority to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. § 476.

100 S. Ct. at 2081.

This expansive language concerning inherent sovereign powers contradicts the rationale of previous decisions which specifically rejected the exercise of tribal power over nonmembers of the tribe in certain instances. A clear example of this contradiction is found in the following language from *United States v. Wheeler*, 435 U.S. at 326, in which the Court addressed the power of a tribe to exercise criminal jurisdiction over its own members:

> *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.*
>
> . . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. *But the powers of self-government,* including the power to prescribe and enforce internal criminal laws, *are of a different type. They involve only the relations among members of a tribe.* Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. (emphasis added).

Accord: Oliphant v. Suquamish Indian Tribe, 435 U.S. at 208-211. Although both *Oliphant* and *Wheeler* concerned issues of criminal jurisdiction as opposed to civil jurisdiction, it is indeed difficult to harmonize the Court's diametrically opposing discussions of tribal sovereignty over nonmembers on that basis alone. The same concerns of fundamental fairness are invoked in either situation.

Unfortunately, this Court's analysis in *Colville* is noticeably lacking in any discussion or apparent recognition of the potential ramifications resulting from the exercise of unfettered sovereignty over nonmembers of a tribe in

civil matters. The Tenth Circuit's opinion below not only expands the extent of tribal sovereignty over nonmembers, it also fails to recognize these concerns. Thus, this case provides an excellent opportunity for this Court to address these ramifications and to resolve the contradictions that do exist.

It is the position of this *amicus* that the precise delineation of tribal sovereignty is of utmost importance to this nation. Crucial to a well-reasoned delineation is consideration of the tension that exists between a sweeping grant of tribal sovereignty over nonmembers on the one hand, and the overriding federal interest in preserving basic conceptual foundations of our republic on the other. The remainder of this brief is devoted to an exploration of the fundamental conflicts which this tension creates.

II. THE CONCEPT OF REPRESENTATIVE GOVERNMENT PRECLUDES UNFETTERED TRIBAL JURISDICTION OVER NONMEMBERS OF THE TRIBE.

Representative government, as manifested through the right of suffrage, is a fundamental concept of our republic. The exercise of Indian tribal sovereignty over nonmembers who can have no voice in that government is the antithesis of this founding concept. The Foundation does not advocate nonmember participation in tribal government. Nevertheless, whenever the Indian tribes are accorded any measure of sovereign power over nonmembers, the issue of representative government is presented. Obviously, the extension of tribal sovereignty over nonmembers is more egregious in some circumstances than others. This case presents to the Court the situation of a tribal government exercising jurisdiction over nonmembers who have no voice in that tribal government, but who are suffering significant deprivation of their civil liberties. Therefore, this case clearly illustrates the potential for abuse.

The right of suffrage is integral to the concept of representative government. *See, e.g.*, U.S. Const. art. I, §§ 1, 2; U.S. Const. amend. XVII. No less than five amendments to the Constitution preserve this basic right of suffrage to *all* the people against any form of impairment. U.S. Const. amend. XV, XVII, XIX, XXIV, XXVI. In furtherance of this ideal, the Court has vigorously upheld this right against dilution or complete denial in both national and local elections. *E.g., City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970) (denial); *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50 (1970) (dilution); *Kramer v. Union Free School District,* 395 U.S. 621 (1969) (denial); *Avery v. Midland County,* 390 U.S. 474 (1968) (dilution); *Reynolds v. Sims,* 377 U.S. 533 (1964) (dilution). In holding that a congressional redistricting statute violated article I, section 2 of the Federal Constitution, this Court observed:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for a classification of people in a way that unnecessarily abridges this right.

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964). Indeed, the Court characterized this right in *Reynolds* as the "bedrock of our political system." 377 U.S. at 562. So fundamentally important is this right of suffrage that it triggers the strict scrutiny standard of equal protection analysis whenever the right to vote is diluted or denied. *Kramer v. Union Free School District,* 395 U.S. at 626.

Thus, it cannot be denied that having a voice in one's government is an overriding federal interest which permeates our entire society. According Indian tribes a measure of sovereignty over non-Indians, as did the Tenth

Circuit in the instant case, calls into question adherence to this fundamental principal of government by the consent of the governed.

The tribes are empowered to determine tribal membership for themselves. *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978); *Roff v. Burney,* 168 U.S. 218 (1897). As *Santa Clara Pueblo* illustrates, membership can be quite restrictive. 436 U.S. at 52 n.2. Thus, there exists the possible situation of a governmental entity exercising sovereign power over citizens who have no voice, and who often cannot obtain a voice, in that government.

In rebuttal to the argument that such a situation violates the fundamental precepts of our nation, one may assert that this is precisely the same situation as a state exercising jurisdiction over nonresidents. However, the analogy is faulty due to at least two crucial distinctions. First, this analogy elevates tribal government to a status in civil matters essentially equal to that of a state government. This is obviously improper as illustrated by this Court's opinion in *U.S. v. Kagama, supra.* Second, and more importantly, the nonresident, whatever his or her race, can easily have a voice in the state's government by merely establishing a bona fide residence in that state. Hence, the opportunity for having a voice in that government exists. There is no correlative opportunity for a nonmember in the tribal government situation.

Further exacerbating this situation of nonrepresentation is the lack of any effective judicial review of the challenged action. Indian tribes traditionally have been held to be immune from suit absent their consent. *Puyallup Tribe v. Washington Department of Game,* 433 U.S. 165 (1977); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506 (1940); *Turner v. United States,* 248 U.S. 354 (1919). Even though individual tribal officers are not immune from suit, *see Puyallup Tribe v.*

Washington Department of Game, supra; cf. *Ex Parte Young,* 209 U.S. 123 (1908) (suit against an individual state officer acting illegally held not barred by the state's sovereign immunity), it is submitted that this avenue is hardly a viable alternative for the following reasons.

If this Court affirms the Tenth Circuit's decision, a challenge to an ordinance on sovereignty grounds will be precluded. Nor is a federal forum available for a challenge on a fundamental civil liberties basis due to this Court's hesitancy to "interfere" with tribal self-government by entertaining civil suits based upon the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1976). *Santa Clara Pueblo v. Martinez,* 436 U.S. at 64, 69-70. Therefore, a challenge to a tribal law would typically be brought in a tribal court. With no possibility of a voice in the workings of tribal government, a nonmember is truly an outsider in such a proceeding. A tremendous potential for abuse exists when a government is totally unaccountable to those it passes judgment upon. This potential for abuse is compounded by the lack of judicial review of the tribal decision in either a state or federal forum. Thus, a nonmember of the tribe could be without both effective grounds to challenge a tribal ordinance and an impartial forum.

This anomalous situation of having neither a voice in the government nor effective review of the governmental action cannot be harmonized with the founding principles of our nation by any maneuvering of jurisprudential logic. This Court stated in *Reynolds v. Sims* as to the question of whether Congress can authorize the states to circumvent strict adherence to the "one-man, one-vote" principle:

> Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

377 U.S. at 582. Thus, neither the dominant sovereign, the United States, nor the lesser sovereigns, the individual

states, have the constitutional power to violate these fundamental principles. The oversight function of Congress and particularly this Court cannot be any less circumscribed as to an entity that is only quasi-sovereign. If this situation is approved, the Indian tribes cease to be lesser entities than the true sovereigns, and indeed become enclaves wielding potentially abusive and arbitrary power.

When a governmental entity exercises sovereignty over individuals having absolutely no voice in that government, it cannot be any less an "unwarranted intrusion on . . . personal liberty" than that found offensive in *Oliphant*. 435 U.S. at 210. The words of this Court in *Reynolds v. Sims* apply in the instant situation:

> [A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

Not only does this case present an opportunity to consider the advisability in general of allowing the tribes to assert sovereignty over non-Indians, the ordinance at issue in the instant situation also calls into question the possible violation of yet another fundamental precept of our society: freedom of contract.

III. ALLOWING A TRIBE TO FUNDAMENTALLY CHANGE ITS VOLUNTARY OBLIGATIONS UNDER A CONTRACT THROUGH THE INSTITUTION OF A "TAX" VIOLATES FREEDOM OF CONTRACT

Petitioners to this action are engaged in the extraction of oil and gas from the Jicarilla Reservation pursuant to leases issued by the tribal council and approved by the Secretary of Interior. Many of these leases existed long before the enactment of the severance tax ordinance by the

Jicarilla Tribe. If this tax is upheld, it will drastically alter the petitioners' obligations under the leases in direct contravention to the agreement that there would be no additional costs or charges without the written consent of both parties. Further, the Tenth Circuit opinion below cursorily disposed of this issue by noting that such a provision is inapplicable to a sovereign's power of taxation. 617 F.2d at 549. Not only does this assertion reveal the mischaracterization of the tribe as a true sovereign by the Tenth Circuit, it also totally ignores the overriding federal interest in preserving the sanctity of contracts. For example, even the states as true sovereigns do not have unlimited power to alter contracts. U.S. Const. art. I, § 10, cl. 1.

Although not subject to the specific prohibitions of the Bill of Rights in the Federal Constitution, tribal governments are subject to similar limits on their power through Title I of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-1303 (1976). *Compare Talton v. Mayes,* 163 U.S. 376 (1896) and *Groundhog v. Keeler,* 442 F.2d 674 (10th Cir. 1971) *with Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). By its terms the ICRA limits "all governmental powers" of a tribe and protects "any person" affected by the exercise of tribal powers. 25 U.S.C. §§ 1301(2), 1302 (3), (4), (6), (8) & (10); *see Oliphant v. Suquamish Indian Tribe,* 435 U.S. at 195 n.6; *Dodge v. Nakai,* 298 F. Supp. 17, 24-25 (D. Ariz. 1968) (extensive discussion of legislative history to interpret the phrase "any person" as including non-Indians). Of particular import to the instant case is the fact that tribal governments are prohibited from depriving "any person of liberty or property without due process of law." 25 U.S.C. § 1302(8).

In construing similar language in the fourteenth amendment, this Court held that the procedural safeguard of due process applies only to those interests properly encompassed in the terms liberty and property. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1972). The "right to con-

tract" is a protectable liberty interest; *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); while rights arising *from* contracts are protectable property interests, *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). Thus by unilaterally changing a material provision of a mutually negotiated contract, the tribe has infringed a protectable liberty and property interest of the petitioners. It is precisely such arbitrary action of the tribe in interfering with property rights which the due process clause was designed to guard against. *Board of Regents v. Roth,* 408 U.S. at 577. Therefore, petitioners are entitled to due process of law before said interests are compromised.

However, obtaining adequate due process of law in this situation is difficult. As Judge Brimmer explained:

> [T]he concept of due process exists to protect the individual against arbitrary action by government, and the fundamental requisites of due process require that one have an opportunity to be heard at a meaningful time and in a *meaningful* manner. (emphasis added).

Berry v. Arapahoe and Shoshone Tribes, 420 F. Supp. 934, 944 (D. Wyo. 1976). Since *Santa Clara Pueblo* effectively precludes a federal forum for the type of due process violation alleged here, petitioners would be relegated to a tribal court to vindicate their claim. 436 U.S. at 72. Justice White noted that this remedy was not likely to be meaningful since "enforcement of these rights . . . [would] be left up to the very tribal authorities alleged to have violated them." *Santa Clara Pueblo,* 436 U.S. at 82 (White, J., dissenting); *see also* S. Brakel, *American Indian Tribal Courts The Costs of Separate Justice* (1978).

The Jicarilla Tribe's dispute over these and similar leases is a long-standing one. *See Jicarilla Apache Tribe v. Supron Energy Corp.,* 479 F.Supp. 536 (D.N.M. 1979). Neither party anticipated the drastic escalation in the price of oil and gas. In reliance on the terms of the lease, peti-

tioners invested substantial amounts of material and labor. Thus, it is manifestly unfair to allow the tribe to unilaterally change its obligation under these leases under the guise of taxation. Indeed, our entire economic system would grind to a halt if the sanctity of contracts was no longer guaranteed. This fundamental unfairness is compounded by the fact that petitioners have no voice in tribal affairs, nor do they have access to an effective forum in which to challenge this arbitrary action.

IV. ALLOWING THIS TYPE OF TRIBAL TAXATION IS INCONSISTENT WITH THE OVERRIDING FEDERAL INTEREST IN ESTABLISHING A NATIONAL ENERGY POLICY

As discussed earlier in this brief, tribal government power is limited not only by express congressional enactment, but also by overriding federal policies. *Oliphant, supra; Colville, supra.* Consequently, the Indian tribes lack the power to enact ordinances of the type in question since they could conflict with the attainment of the overriding federal interest in establishing a comprehensive energy policy.

The Arab Oil Embargo instituted by OPEC in the early 1970's highlighted this nation's dangerous dependence on imported oil. Congress responded with a variety of measures designed both to increase domestic production of fossil fuels and to encourage development of alternative forms of energy. *See* Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6214 (1976); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5917 (1976). These measures were supplemented by a renewed emphasis on conservation. *See* Energy Conservation Standards for New Buildings Act of 1976, 42 U.S.C. §§ 6831-6840 (1976); Energy Conservation in Existing Buildings Act of 1976, 42 U.S.C. §§ 6851-6892 (1976).

By 1977, Congress recognized that this country was facing a shortage of nonrenewable energy and, at the same time, was becoming increasingly dependent on foreign energy supplies. Department of Energy Organization Act, 42 U.S.C. § 7111 (1-2) (Supp. I 1977). Realizing that in the context of a fragmented approach to energy matters this disturbing trend constituted a threat to our national security, Congress mandated a comprehensive national energy policy to be implemented by the newly created Department of Energy. 42 U.S.C. § 7111 (Supp. I 1977).

Clearly, the establishment of a comprehensive long-range national energy policy is an overriding federal interest. Indeed, President Carter in his most recent State of the Union address noted:

> Our excessive dependence on foreign oil is a clear and present danger to our Nation's security.
>
> The need has never been more urgent. At long last, we must have a clear, comprehensive energy policy for the United States.

President Carter's State of the Union Address, January 23, 1980, *reprinted in* 1 U.S. Code Cong. & Ad. News 135 (March 1980). It is against this backdrop of an urgent federal interest in developing a comprehensive energy plan that the tribe's enactment in this case must be evaluated.

Indian tribes in this country control a significant amount of energy reserves. 1 American Indian Policy Review Commission Final Report 7, 338-339 (1977). As of 1977, forty separate tribal governments in seventeen different states controlled a portion of these reserves. *Id.* at 338. From a logistical standpoint alone, the evaluation and coordination effort needed to integrate forty separate regimes of energy-related taxation into a comprehensive national strategy is staggering.

In arguing the case below, the Secretary of Interior asserted that the tribes could use their purported sovereign

right to tax as a tool to restrict development of their reserves even under existing leases. Brief in Chief of the Secretary of Interior at 22-23, 27; *see also* 1 American Indian Policy Review Commission Final Report 179 (1977). Moreover, it is not speculative to assume that if the ordinance at issue in this case is upheld, other tribal governments will follow suit. *See Conoco, Inc. v. Shoshone and Arapahoe Tribes,* No. L. 80-0181 (D. Wyo., filed June 23, 1980) (Shoshone and Arapahoe Tribes' reassertion of their severance tax ordinance in reliance on the Tenth Circuit opinion below). Therefore, this Court must consider whether in light of these ramifications and the desire to establish a comprehensive energy plan, it is in the national interest to have forty separate enclaves that can not only tie up future development, but also stall existing production under previously negotitated leases by unilaterally increasing, in potentially unrestrained amounts, the cost of production.

CONCLUSION

Affirmance of the Tenth Circuit's opinion will extensively expand the nature and extent of inherent Indian tribal sovereignty over nonmembers of a tribe. Such an expansion contradicts the fundamental concept of representative government which forms the basis of our republic. The exercise of sovereignty over nonmembers who have no possibility of a voice in the tribal government is incompatible with any notion of fundamental fairness.

In addition, the ordinance in the instant case amounts to a unilateral modification of the preexisting leases between the parties. Not only is this modification in contravention of the express terms of the leases, said enactment also violates petitioners' liberty and property interests. Further, adequate due process of law is unavailable to petitioners because of the nature of tribal courts. Exacerbating this situation is the total lack of state or federal judicial review of a tribal court decision.

Finally, this Court must consider whether tribal ordinances of this type are consistent with the overriding federal interest in implementing a national energy policy.

It is crucial that this Court resolve the contradictions currently present in Indian law in a way that does not impair the validity of the fundamental concerns raised in this brief.

For the foregoing reasons, the ordinance in question should be struck down and the Tenth Circuit's opinion should be reversed.

Respectfully submitted this 20th day of November, 1980.

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioners,

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

~~**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**~~

and

BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land within the states of Arizona, New Mexico and Utah. The tribe possesses extensive energy and mineral resources including coal, oil and uranium among others and has enacted several laws including a sulfur emissions environmental measure, a possessory interest tax and a business activity tax, each of which when implemented will impose costs on corporations operating on tribal lands. The majority of these corporations are non-Navajo. These various laws have been challenged in the federal courts of Arizona, New Mexico and Utah; some are pending in district court, some are on appeal. A central issue in each action is the tribe's authority to subject nonmember lessees of tribal lands to its taxing and regulatory authority. Moreover, the tribe is actively engaged in negotiating and renegotiating leases with numerous mineral, energy, pipeline and other companies. The outcome of this case will directly affect those laws, pending litigation and ongoing negotiations.

SUMMARY OF ARGUMENT

This case reflects a new urgency in clarifying the scope of tribal self-governing authority at a point in history where federal policy has been pressing simultaneously for expanded tribal self-government, accelerated energy resource development, more rigorous environmental controls and increased economic self-sufficiency for tribes. Non-Indian corporations hold extensive mineral exploration and extraction leases on tribal lands negotiated

decades ago by the Bureau of Indian Affairs; these leases were routinely ratified by the tribes, often at a time when tribal government was, at best, nominal. These leases rarely contained provisions for renegotiation, automatic price escalation to reflect market conditions or adequate machinery for enforcing environmental protection or preferential employment policies. Tribal governments, now seeking to assume increased responsibility within the framework of the federal trustee relationship, are enacting various regulatory and revenue generating laws and where federal law requires, these Tribal laws are then approved by the same federal Trustee which negotiated the original lease. Those mineral companies and other non-Indian corporations directly affected by these new assertions of self-governing authority by tribal governments (acting with the approval of the federal government) are being challenged on grounds that will ultimately determine the status and chances of survival of Indian tribes as sovereign dependent nations.

This brief argues that the power to subject foreign corporations to reservation law (including tax and regulatory laws) is an inherent attribute of tribal sovereignty; that this exercise of tribal sovereignty is continuous in nature and cannot be predicated upon a "one-time power to condition entry" which, once granted by lease or contract, is forever frozen in time, diminished and restricted with respect to that "entry"; that, at the very least, tribal sovereignty entails the power to eschew present benefits and forego present income in order to enhance long term chances of survival when the terms of "entry" are found to be inimical to tribal self-determination and survival; and that restrictive interpretations of tribal

authority by this Court will not only thwart congressional mandates toward self-determination but will actually remove incentives toward accelerated development of energy resources which our national energy policy seeks to achieve. Finally, this brief urges that those who have long opposed the constitutionally distinct status of Indian nations have combined in this case with those who seek a windfall from mineral and energy resource extraction to undermine those vital attributes of self-government essential to the survival of Indian nations and maintenance of the federal trust relationship.

I. SOVEREIGNTY NOT PROPRIETORSHIP IS THE JUDICIALLY-RECOGNIZED FOUNDATION FOR THE TRIBAL POWER TO TAX, A POWER TO CONTINUOUSLY CONDITION ENTRY ONTO TRIBAL LANDS.

A recurrent theme in this energy company challenge to tribal sovereignty is that the tribal sovereignty recognized by numerous decisions of this Court is a peculiarly limited sovereignty touching upon only tribal members. The corporate contention is that with respect to nonmembers on tribal lands, the tribe has only the proprietary powers that a right of occupancy provides and not the powers of a sovereign nation. The companies repeatedly characterize tribal powers with relation to nonmembers as "the power to condition entry".

The sovereignty of Indian Tribes encompasses an aspect of territoriality. This has repeatedly been recognized by this Court. *White Mountain Apache Tribe v. Bracker*, _ U.S. _, 100 S.Ct. 2578 (1980) (Federal preemption of state authority over Indian affairs is determined by

reference to the "tradition of Indian sovereignty over the reservation and tribal members." 100 S.Ct. at 2583); *Washington v. Confederated Tribes of the Colville Indian Reservation*, ____ U.S. ____, 100 S.Ct. 2069 (1980) (Recognizing that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest." 100 S.Ct. at 2081); *United States v. Wheeler*, 435 U.S. 313 (1978) *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1974) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." 435 U.S. at 323); *Williams v. Lee*, 358 U.S. 217 (1958) (Stating that this Court has "consistently guarded the authority of Indian governments over their reservations." 358 U.S. at 223);

The territoriality aspect of tribal sovereignty is rendered meaningless by the energy companies' insistence that tribes have a right to occupy *but not to govern* lands held for them in trust by the federal government. The Navajo Tribe respectfully submits that tribal sovereignty is the power to govern on tribal lands. Those who enter on Tribal land must expect to comply with Tribal law. They can receive no guarantee that Tribal law will remain static or that changes will not affect them.

For two hundred years national policy has been to protect tribes and, more recently, to promote tribal self-sufficiency and economic development. (*See* Part IV.A. *infra* of this Brief). Since the early nineteenth century this court has encouraged the growth of tribal governments. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Williams v. Lee*, *supra*. The Presidents of the United States now encourage the development of the fledgling commer-

cial economies of once agrarian or nomadic peoples. (*See* Part IV. A. *infra* of this Brief). Subsequent to execution of the leases here involved, national policy reflected in Acts of Congress, authoritative actions of the Executive Branch and judicial opinions has emphasized, authorized and legitimated an expanded exercise of tribal sovereignty as a chosen vehicle to enhance Tribal self-determination and to discharge federal trust responsibilities.

The energy lessees now seek to negate the territoriality aspect of tribal sovereignty by arguing that tribal "self-government" and tribal government of "internal" affairs means Indian sovereignty extends only to *tribal members* on tribal lands. This restriction of tribal sovereignty to tribal members is intended to support the corporate theory that as to nonmembers the tribe's powers are that of a landowner, not of a government. This Court has, however, consistently found that non-members on tribal lands are subject to *sovereign* tribal powers. Thus, in *Williams v. Lee*, *supra*, this Court found that not to require nonmembers to use tribal courts to pursue claims against Indians arising on the reservation "would infringe on the right of the Indians to govern themselves." 358 U.S. at 223. A sovereign, not a landowner, can require use of his courts. The impact of tribal sovereignty on nonmembers was at issue in *Williams v. Lee* and this Court turned a deaf ear to arguments that nonmember status entitled one to special privileges: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

The Navajo Nation respectfully submits that self government is not the power to govern only oneself but rather the power to initiate and implement government

action independently of constraints imposed by a superior authority. Self government as applied to an Indian Tribe is modified to the extent that as domestic, dependent nations, tribes have agreed to abide by the dictates of Congress and to conduct their governments in such a manner as is consistent with their alliance with the superior federal power. Absent a contrary expression of Congress, this alliance with the federal government, will not suffer with the imposition of a tax upon energy production on tribal lands.

Any government to function must have the power to raise revenues needed to pay the costs of governing. As Felix Cohen noted in his treatise *Handbook of Federal Indian Law* (U.N.M. ed. 1942):

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by an act of Congress is a proposition which has never been successfully disputed.
>
> * * *
>
> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the tribal jurisdiction.

At 142 and 143 (footnotes omitted).

This Court has recognized the importance of the power of taxation with relation to state governments: "The power of taxation is *indispensable* to [the states'] existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same

time." *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824) (emphasis added).

This Court's recent decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*, recognized that: "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is *a fundamental attribute of sovereignty* which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 100 S.Ct. at 2080-81. The language which so incessantly crops up in energy lessees arguments "the power to condition entry" is conspicuously absent from this Court's statement of tribal taxing power as an aspect of sovereignty.

Tax-related decisions of the lower courts either uphold this tribal power on the basis of sovereignty or use sovereignty, not proprietary rights, as the foundation for the "power to condition entry" language. *Fort Mohave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977) (holding that both a state and tribe could simultaneously impose taxes without double taxation because they were "two different and distinct taxing authorities." 543 F.2d at 1258.); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F. 2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), *quoting Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F. 2d 89, 99 (8th Cir. 1956) (upholding tribal power to tax as "an inherent incident of sovereignty"); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 559 (1906) (finding that "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement

of the United States. It was one of the inherent and essential attributes of its original sovereignty.")

Sovereignty, not simply a right of occupancy, supports the tribal power to condition entry onto its lands.

II. THE COMMERCE CLAUSE HAS NO APPLICATION TO TRIBAL TAXATION OF ENERGY LESSEES IN THE ABSENCE OF CONGRESSIONAL ACTION.

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) this Court confirmed that Indian Tribes are subject to the dictates of Congress but not to the provisions of the Constitution addressing the balance within state and federal government: "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." 436 U.S. at 56.

The Commerce Clause, art. 1, §8, cl. 3, of the Constitution imbues Congress with the power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause is a grant of power to the federal Congress and a withdrawal of power from the states. The Commerce Clause does not address or restrict the legislative powers of tribes and under *Martinez* is not, of itself, a constraint on tribal powers.

The energy lessees urge this Court to apply the Commerce Clause as a per se restriction on tribal sovereignty, and, in particular, to apply the Commerce

Clause to tribes as it is applied to states. This contradicts not only *Martinez* but the history of the Commerce Clause as well.

This Court has long recognized that the power of Congress with respect to Indian affairs is of a different nature than the power of Congress over interstate commerce. Thus, although this Court has frequently struck down legislation which attempted to intrude on the exclusive power of Congress to regulate commerce among the states (*e.g.*, the seminal case of *Gibbons v. Ogden, supra*) it has measured tribal laws not by whether they "intrude" on the powers of Congress but by whether the tribal law conflicts with an "act" of Congress restricting the exercise of tribal sovereignty in a particular area (*e.g., Santa Clara Pueblo v. Martinez, supra).* The "exclusive" power of Congress to legislate with respect to Indian affairs is exclusive as to the states not as to the tribes. Tribes are free to legislate in areas of retained sovereignty unless Congress expressly legislates to the contrary. *Santa Clara Pueblo v. Martinez, supra* at 56.

The reference in the Commerce Clause to Indian Tribes originates with the Articles of Confederation of March 1, 1781. The Supreme Court addressed the evolution of the federal power over Indian affairs from these Articles to the present constitutional form in *United States v. Forty-three Gallons of Whiskey,* 93 U.S. 188 (1876) (confirming the federal power to regulate the sale of liquor to Indian Tribes):

> Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of

> a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; *and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,*—a power as broad and as free from restrictions as that to regulate commerce with foreign nations.

93 U.S. at 194 (emphasis added).

The purposeful omission by the constitutional convention of that language permitting state intervention in Indian matters was also recognized by this Court in *Cherokee Nation v. Georgia, supra*, which stated that the Constitutional Convention intended: "[T]o give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it, as granted in the confederation." 30 U.S. at 13.

Thus, the purpose of the constitutional grant of power to Congress to regulate commerce with the Indian Tribes, the Indian Commerce Clause, was to place all control over Indian matters with the federal Congress and to preclude state interference. This is confirmed by Prentice and Egan in *The Commerce Clause of the Federal Constitution* (1898), *quoted in* Cohen, *Handbook of Federal Indian Law* (U.N.M. ed. 1942) at 91-2 n.22:

> The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to

> protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks.
>
> *A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce.* Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce.

At 342 (emphasis added).

The *Martinez* decision and the history of the Indian Commerce Clause demonstrate that tribal taxation is not to be measured by those constitutional standards used to prohibit state interference with freedom of commerce (*e.g.* prohibition of multiple burdens on commerce), but it is instead to be judged by the limitations, if any, imposed on tribes by Congress pursuant to the plenary powers granted Congress by art. 1, §8, cl. 3, of the Constitution. Parts III and IV of this Brief show that Congress has yet to use this plenary power to preempt tribal taxation.

III. THE TRUST RELATIONSHIP IS NOT A PER SE PREEMPTION OF TRIBAL SOVEREIGNTY: THE PURPOSE OF FEDERAL SUPERVISION OF INDIAN AFFAIRS IS TO ENCOURAGE TRIBAL SELF-SUFFICIENCY, NOT TO DESTROY IT.

In *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578 (1980) this Court found that a state tax which

fell upon non-Indians doing business on an Indian reservation was preempted by pervasive federal regulation of the particular business activity. The energy companies place heavy reliance on *Bracker*. The companies contend that the Jicarilla Apache tribal tax, like the state tax in *Bracker*, is preempted by federal regulation of oil and gas leasing on Indian lands. To reach this conclusion they reason first, that federal regulation of energy leases on tribal lands is as comprehensive as the federal timber regulations which were the subject of *Bracker*; second, that the federal laws and regulations intended to *protect* tribes by providing for Interior approval of leases actually operate to *eliminate* tribal self-government with respect to the subject matter of these federal laws and regulations; and third, that tribal leases, once approved by the Secretary, become federal in nature and immune from further tribal action. A review of each of these arguments will show the wisdom of this Court's observation in *Bracker* that:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of the sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.

100 S.Ct. at 2583.

The reliance of the energy companies upon *Bracker* has been misplaced. First, with respect to their contention that federal timber regulation equates to federal oil and gas regulation, the question becomes one of degree. They key distinction between the two is the pervasive nature of the federal regulations with respect to the day-to-day federal supervision of the harvesting and sale of timber and the more limited nature of the federal regulations with respect to oil and gas leases.

In *White Mountain Apache v. Bracker, supra*, the Court was impressed with the comprehensive nature of the federal supervision of timber harvesting:

> That regulation takes the form of Acts of Congress, detailed regulations promulgated to the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.
>
> * * *
>
> Bureau employees regulate the cutting, hauling, and marketing of timber of FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height and weight of loads.

100 S.Ct. at 2584-86.

By contrast, the federal statutes and regulations upon which the energy companies rely for their preemption argument simply enforce the trust relationship.

The federal statutes which primarily regulate mineral leases and oil and gas leases on reservations are codified in

25 U.S.C. § *et seq.* Section 396(a) is typical of these provisions and merely states that tribal governments may lease mineral lands with the approval of the Secretary of Interior and that the term of such a lease shall not exceed ten years and as long thereafter as minerals are produced in paying quantities. This obviously is not "day-to-day" federal supervision of the ordinary business decisions of the lessees. The Secretary of Interior has issued rules and regulations to enforce these statutes and these are compiled in 25 C.F.R. Subchapter P - Mining. These regulations also provide a method for the payment of royalties, a simple bookeeping matter. Nowhere in these regulations does it appear that the business decisions to be made by the lessee in the ordinary course of its day-to-day business operations are subject to the review of the Secretary acting in his trustees capacity.

The federal regulation of oil and gas leases on Indian reservations is a significantly lesser intrusion by the federal government into the ongoing operations of the lessee than that resulting from the regulation of the harvesting and sale of timber. *Bracker* has no application here.

Equally untenable is the second prong of the companies' *Bracker* argument—that the dependent status of the tribes, expressed by the federal government in its approval of leases and regulation of lessees of tribal lands, is in itself a preemption of tribal governing power with respect to leased tribal lands.

The trust relationship lies at the heart of Indian-United States relations. It was first characterized as such by this Court in *Cherokee Nation v. Georgia, supra*, in which the court found the Indian tribes to be "domestic dependent nations" and observed that: "Their relation to

the United States resembles that of a ward to his guardian." 30 U.S. at 17. The trust relationship has been repeatedly reaffirmed by this Court. *United States v. Kagama*, 118 U.S. 375 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." At 384); *United States v. Sandoval*, 231 U.S. 28 (1913) ("[A] long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities." At 46; *United States v. Creek Nation*, 295 U.S. 103 (1935) ("The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government." At 109).

The trust relationship is then the cornerstone of federal Indian policy and if *Bracker* is to be applied wherever federal laws and regulations address activity on Indian lands or relating to trust property, then tribal self-government will be brought to a standstill since little activity exists outside the structure of the trust relationship. Such an expansive view of preemption of tribal taxes by virtue of provision for federal approval of leases is squarely rebutted by this Court's position in *Colville*. There the Court found that an Indian Tribe has the power to tax the activities and property of non-Indians *on trust land*. 100 S.Ct. 2080. Thus, the trust relationship as an integral

aspect of federal Indian policy was recognized by this Court in its prior affirmance of tribal taxation. A relationship intended to nurture tribal governments should not be used to eviscerate them. The trust relationship is not "proof" that Congress does not intend tribes to stand on their own two feet.

Much is made of the fact that the Secretary of Interior has approved the oil and gas leases entered into by the Jicarilla Apache Tribe and the leases are frequently characterized by the energy companies as "federal" as a result of the Secretarial approval.

No energy company has cited this Court to an authority holding that a lease entered into by a tribe and reviewed and approved by the Secretary of Interior acting in his trustee capacity is from that day forth a federal rather than a tribal lease. Moreover, in *Colville* this Court refused to find that the mere fact of Secretarial approval of tribal tax laws was sufficient to preempt state tax laws. 100 S.Ct. at 2082. Secretarial approval of oil and gas leases is, similarly, a simple incident of the trust relationship. The leases remain tribal leases and the Secretarial approval has no preemptive bearing on the tribes retained sovereign power to levy a tax upon the lessee.

This is not the first time that an oil and gas company has sought to escape taxation for activities on tribal lands. In *Heiner v. Colonial Trust Co.*, 275 U.S. 232 (1927) an oil lessee of tribal lands sought to avoid the federal income tax. The Court first observed that the "lease was in the form prescribed by the Secretary of the Interior and was approved by him" (275 U.S. at 233) and then found that the "power of the United States to tax the income is undoubted." (275 U.S. at 234.) In numerous decisions of the

lower courts the argument has been made that federal regulation of lessees of tribal lands preempts state taxation of the lessee. This argument has met with uniform rejection. *Crow Tribe of Indians v. State of Montana*, 469 F.Supp. 154 (D. Mont. 1979) ("In the instant case, however, there is no body of federal law either governing the method by which coal underlying reservation lands is to be taxed or immunizing non-Indian lessees from the application of state law." At 163); *Fort Mojave Tribe v. County of San Bernandino, supra*, (holding the California possessory interest tax applicable to tribal lessees); *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1171), *cert. denied*, 405 U.S. 933 (1972).

The federal district court for the District of New Mexico addressed the issue in *Norvell v. Sangre de Cristo Development Co.*, 372 F.Supp. 348 (D.N.M. 1974) *rev'd on other grounds*, 519 F.2d 370 (10th Cir. 1975):

> "A nondiscriminatory state tax levied upon the defendant company, organized as it is for profit and *only incidentally performing a federal function by leasing from Indians*, is proper. The Company does not become a federal instrumentality by virtue of the lease. Nor does such a tax do violence to the governmental powers of the pueblo.
>
> "There is, further, no federal statute which forbids the imposition of this state tax upon the leasehold interest, and there can be no assumption that Congress intended to create an immunity for the lessees."

375 F. Supp. at 358 (emphasis supplied, footnote omitted).

There is simply no relationship between federal approval

or current regulation of lessees of tribal lands and the inherent power of an Indian tribe to tax activities and property on trust land. One does not preempt the other.

IV. IF THE NATIONAL ENERGY POLICY MUST BE BALANCED AGAINST EXPRESSED CONGRESSIONAL GOALS OF TRIBAL ECONOMIC GROWTH, IT IS FOR CONGRESS TO MAKE THAT BALANCE.

A. Federal Indian Policy Encourages Tribal Economic Development.

In *Washington v. The Confederated Tribes of the Colville Indian Reservation, supra,* this Court found that tribal sovereign powers were divested by their dependent status where "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government," 100 S.Ct. 2069, 2081, and observed that as to tribal taxation of the sale of cigarettes "we can see no overriding federal interest that would *necessarily* be frustrated by tribal taxation." *Id.* at 2081 (Emphasis added.)

The energy companies' challenge to the Jicarilla Apache oil and gas severance tax is based in part on their belief that domestic energy development is an overriding federal interest necessarilyincompatible with and superior to tribal taxation. To invalidate tribal taxes on this ground, the Court must ignore the existence of an equally significant federal commitment to tribal economic development or must find the energy policy preemptive of the federal Indian policy where a conflict is noted.

This Court has on numerous occasions taken judicial notice of recent congressional and Executive actions affirming the importance of tribal economic development and the centrality of reaffirming tribal sovereignty as the foundation of enhanced tribal self-determination. Thus, in *White Mountain Apache v. Bracker, supra*, this Court stated: "As we have repeatedly recognized, this tradition [of Indian sovereignty over the reservation and its members] is reflected and encouraged in a number of congressional enactments demonstrating *a firm federal policy of promoting tribal self-sufficiency and economic development.*" 100 S. Ct. at 2583-84 (emphasis added).

The *Bracker* opinion noted recent acts of Congress intended to better the economic condition of the Indian Tribes including the Indian Financing Act of 1974, 25 U.S.C. §1451, *et seq.;* the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §461 *et seq.;* and the Indian Reorganization Act of 1934, 25 U.S.C. §450 *et seq.* 100 S.Ct. at 2583-84.

The support of the Courts and Congress for Indian sovereignty, economic self-sufficiency and self-determination has been encouraged and reaffirmed by the Executive Branch. President Richard M. Nixon in a July 8, 1970, Message to Congress set forth "Recommendations for Indian Policy":

> The time has come... to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.
>
> * * *
>
> Economic deprivation is among the most serious of Indian problems. [I]t is critically important that that

> the Federal government support and encourage efforts which help Indians develop their own economic infrastructure.
>
> * * *
>
> [I]t is essential that the Indian people continue to lead the way by participating in policy development to the greatest possible degree.

H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (1970).

President Nixon's statement echoed the sentiments of President Lyndon B. Johnson's Message to Congress, "The Forgotten American," urging passage of the Indian Civil Rights Act. 114 Cong. Rec. 5518, 5520 (1968). Furthermore, President Reagan in a pre-election message to the Indian peoples gave reassurance that the economic development of the Indian tribes would be a goal of his administration: "Economic self-sufficiency will be a goal of my Administration, both in Indian affairs and in the nation at large." Clary Institute *quoted in* The Navajo Times, Oct.30, 1980 at B-5, Col.7.

Recognition by the Courts, the Congress and the Executive of the firm federal policy of promoting Indian economic development obliges the energy companies to demonstrate a basis for asserting that policy is necessarily incompatible with a commitment to domestic development of energy resources so as to preempt all exercise of residual tribal sovereignty that might conceivably decrease the profit margins of energy resource developers by increasing the return available to the tribes as energy resource owners. The Court has been traditionally reluctant to arrogate such a role for itself: "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the

absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez, supra*, at 60.

B. The National Energy Policy Has Survived Federal, State and Local Taxation of Energy Companies and Can Survive Tribal Taxation As Well

The spectre of oppressive tribal taxation destroying the energy policies recently implemented by Congress is forcefully asserted but not substantiated by the reluctant taxpayers. Tribal taxation, the energy companies urge, will be an impossible "unknown" for Congress in formulating and implementing a national energy policy. Furthermore, the companies argue tribal taxation of nonmembers has no political restraints and is certain to be exercised in such an oppressive and confiscatory manner as to endanger the future of energy production and threaten the national energy supply.

There is no "inherent" extreme danger to our national interests in the taxation of oil and gas production or, presumably, the federal and state governments would have refrained from tapping this source of income. It is difficult to give much credence to corporate concerns that Congress, which adjusts to the multitude of state taxes imposed on energy production,somehow cannot similarly cope with tribal taxes. If Congress does have difficulty structuring a national energy plan in light of tribal taxation, then it has plenary power derived from the trust relationship and the Indian Commerce Clause to promulgate guidelines for tribal tax programs or, in the extreme case, to abolish the tribal taxing power altogether.

As to the oppressive nature of tribal taxation, the

lessees' fears are again unjustified. The Indian Tribes have few sources of revenue with which to support their people. Rare indeed would be the tribal government which deliberately drove away from reservation lands what little source of employment might exist. Just as the states and federal government are sensitive to the practical economics of taxation, so too the Indian Tribes will strive to protect, not destroy, the proverbial goose. The American Indian Policy Review Commission's *Final Report* (1977) stated the obvious:"It is difficult to imagine that any tribal government would attempt to enact and administer a tax provision without looking into its relative merits and costs versus benefits." At 180.

Further protections afforded the energy companies from any possible abuse of the tribal taxation power are set forth in Part V of this Brief.

C. Whether Tribal Economic Self-Sufficiency Must Yield to a National Energy Policy Is a Political Question More Appropriate for Congress than for the Courts.

In the present case, the Court is asked to determine whether federal energy policy or federal Indian policy is the greater federal interest. This sort of determination is a nonjusticiable issue falling squarely within the political question doctrine described by the Court in *Baker v. Carr*, 369 U.S. 186 (1962).After emphasizing the importance of the political question doctrine with relation to Indian Tribes, the Court set forth various formulations for discerning a political question which included: " A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for

resolving it." 369 U.S. at 217.

The Commerce Clause is a "textually demonstrable constitutional commitment" of Indian sovereignty issues to Congress. While no precise language addresses energy matters, Congress is also imbued with the power to regulate commerce among the states and to preserve the welfare of the country. Certainly there is no "judicially discoverable and manageable" standard for resolving a controversy as to whether Indian sovereignty or oil is of greater national concern.

The Jicarilla Apache severance tax was enacted in 1977. The taxes of the Navajo Tribe were enacted in 1978. Congress has yet to pass legislation exempting energy lessees from tribal taxation and, given the significance of this country's federal Indian policy, it would be inappropriate to simply assume that domestic energy bills were intended to override tribal economic growth. If that decision is to be made, it is for Congress, not the courts, to make it.

V. THE ENERGY CONGLOMERATES NEED NOT FEAR THE "AWESOME" POWERS OF THE NATIVE AMERICAN: CONGRESS, THE INDIAN CIVIL RIGHTS ACT AND NORMAL POWERS OF POLITICAL PERSUASION OFFER PROTECTION.

The energy lessees urge that tribal taxation necessarily results in oppressive and confiscatory measures. Congress, however, possesses full powers to legislate with relation to the exercise of Indian sovereignty and has done so where it deemed necessary. *See, e.g.* The Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* This plenary power has

been variously attributed by this Court to the Indian Commerce Clause, art. I, §8, cl.3, of the Constitution or to the trust relationship or to both. *Williams v. Lee, supra*, at 219 n.4. As this Court stated simply in *Santa Clara Pueblo v. Martinez, supra* at 56: "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." (Citations omitted.)

The energy companies are not lacking a forum should tribal taxation become "oppressive" or "confiscatory": Congress controls the exercise of tribal sovereignty and could impose regulations on tribal taxation or permit federal review of tribal tax laws should the need arise.

The energy companies have also voiced a strong concern as to the even-handedness of tribal taxation of nonmembers. This concern is met by the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* which, in pertinent part, provides: "No Indian tribe in exercising powers of self-government shall--(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. §1302. The impact of this federal statute on tribal government is examined by this Court in *Santa Clara Pueblo v. Martinez, supra:*

> Moreover, contrary to the reasoning of the court below, implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress'objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the

> law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65 (footnotes and citations omitted).

The corporate lessees of tribal lands seek to avoid *Martinez* by urging that tribal forums will be biased in favor of tribal laws and that federal rights will be determined with finality by the tribal courts. Neither argument has merit.

There is no inherent prejudice in the common practice of a court determining the validity or application of the laws of its own government and tribal courts should similarly be accorded the right to determine the validity and effect of tribal laws. The most egregious element of the energy companies' contention that the Indian Civil Rights Act is "certain" to be abused by tribal courts is that not one of these companies has shown the court that it has even attempted to use the tribal judicial process to challenge "abusive" tribal taxation, much less failed to obtain satisfaction from it.

The companies express further concern that fair consideration is impossible for them because tribal governments may not have a clear separation of legislative, executive and judicial functions. *Martinez*, however, directs tribal *forums*, not simply courts, to apply the principles set forth in §1302 and finds that: "Non-judicial tribal institutions have also been recognized as competent law-applying bodies." 436 U.S. at 66. A blend of governing powers is not an automatic loss of impartiality. The British

Parliament, for example, is the "court" of last resort in that system without any apparently disasterous results.

The second argument, that federal rights will be determined with finality in tribal forums, is equally specious. This is premised on a false assumption that a tribal lease which complies in its terms with federal regulations and which is approved by the Secretary of the Interior acting as trustee for the tribe is actually a federal lease. In any event, the companies can appeal to Congress or, in certain instances, to the Secretary of Interior. *Santa Clara Pueblo v. Martinez, supra* at 66 n.22.

The energy companies have further expressed grave concern that their inability to vote in tribal elections will remove any constraints the tribal government might otherwise have with respect to the level of taxation to be imposed. These companies do not, of course, actually vote in any election be it tribal, state or federal. Their employees, however, are likely to be tribal members who can vote in tribal elections and who have a high stake in the continued productive activity of their employer—the scarcity of employment on Indian reservations is a well-documented fact. American Indian Policy Review Commission, *Final Report* at 92-3 (1977).

Neither at home nor abroad does lack of suffrage seem to operate as a significant deterrent to public awareness of the concerns of energy companies.

CONCLUSION

The resolution of issues raised by the present impact of tribal laws on nonmember energy lessees need not rest upon static concepts of tribal sovereignty, property conveyance or the federal trust relationship. The issues now before this Court arise at a time where national policy has moved towards equating tribal sovereignty with tribal self-determination, at a time where changing market conditions have injected an issue as to whether tribes may, with the approval of the federal trustee, share equitably with their energy lessees in windfall profits, and at a time where the evolving trust relationship has moved toward tribal initiatives subject to limited federal review. These circumstances, the Navajo Tribe respectfully submits, compel a determination that the tax laws of the Jicarilla Apache Tribe are valid.

For the foregoing reasons the Tenth Circuit's opinion should be affirmed.

Respectfully submitted this 22nd day of January, 1981.

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CERTIFICATE OF SERVICE

I, George P. Vlassis, attorney for the amicus curiae and a member of the bar of this court, certify that all parties required to be served have been served with the foregoing motion and brief; specifically that on January ___, 1981, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing motion and brief of amicus curiae addressed to each of the following:

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Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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v.

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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF NEW MEXICO, NORTH DAKOTA, UTAH AND WYOMING AS AMICI CURIAE

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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATE OF NEW MEXICO, NORTH DAKOTA, UTAH AND WYOMING AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This Brief is filed on behalf of the State of New Mexico and is sponsored by the Attorney General of the State of New Mexico for purposes of compliance with Supreme Court Rule 36.4.[1] This brief is also filed on behalf of the States of North Dakota, Utah, and Wyoming.

Within the Amici States significant areas of land established as Executive Order Indian reservations contain substantial reserves of oil, gas, coal and other natural resources. The Amici States have exercised and

[1] See letter of November 18, 1980 from the Attorney General of New Mexico to the Supreme Court Clerk, on file in the Clerk's office.

relied upon their exclusive power to tax the extraction of oil and gas by non-Indian producers pursuant to 25 U.S.C. §§398a-398e for many years. If the decision of the Tenth Circuit is allowed to stand, it will undermine the congressional scheme embodied in 25 U.S.C. §§398a-398e and create serious consequences for the state taxing schemes and for the consumers of oil and gas.

SUMMARY OF ARGUMENT

I.

The State of New Mexico has the power to tax the extraction of oil and gas from Indian reservation lands. The severing of oil and gas is an activity properly subject to state taxation. The states were granted the exclusive power to tax the entire output of oil and gas on Executive Order Indian reservations under the Act of March 3, 1927, 25 U.S.C. §§398a-398e. It is clear from the Legislative history of the Act of March 3, 1927 that the Congressional policy expressed in that act was to divide the benefits of the severance of oil and gas upon Executive Order Indian reservations between the States and the Tribes by allocating to the States the exclusive power to tax the entire output of oil and gas production on such lands while granting to the Tribes all of the rental, royalty and bonus incomes from that production.

II.

The Tenth Circuit's decision effectively negates this longstanding Congressional policy of equitably allocating the benefits of oil and gas production between the Tribes and the States, and subjects the States to the risk of losing substantial revenue now generated by their severance taxes. The additional burden created by the Jicarilla severance tax will lead to a reduction in oil and gas pro-

duction from marginal wells, discourage exploration in all but proven areas, and cause other wells to be abandoned sooner than they would be under current conditions. In addition, it is obvious that the potential for abuse is great where those being taxed have no voice in the adoption of the tax. Moreover, non-reservation consumers are thereby forced to pay for some or all of the cost of tribal government through increased energy bills.

ARGUMENT

I.

The States Have The Exclusive Power To Tax The Severance Of Oil And Gas On Executive Order Indian Reservations.

The States have the power to tax the severance of oil and gas on Executive Order Indian reservations.[2] They enjoy this power under their general power to tax the severance of minerals within their boundaries, *see e.g.*, *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 65 L.Ed.2d 10 (1980); *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284 (1927), and under the specific authorization to tax oil

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[2] *E.G.*, New Mexico tax statutes applicable to oil and gas production throughout the State, including Executive Order Indian reservations, are the Oil and Gas Severance Tax, §§7-29-1 to 22; the Oil and Gas Conservation Tax, §§7-30-1 to 26; the Oil and Gas Emergency School Tax, §§7-31-1 to 25; the Oil and Gas Ad Valorem Production Tax, §§7-32-1 to 27; the Natural Gas Processors Tax, §§7-33-1 to 22, N.M.S.A. 1978; and the Oil and Gas Product Equipment Ad Valorem Tax, §§7-34-1 to 20.

and gas production on Executive Order Indian reservations in the Act of March 3, 1927, ch. 299, 44 Stat. 1347, 25 U.S.C. §§398a-398e.

The State of New Mexico and other states are granted not only authorization to tax by Section 398c, but also the *exclusive* power to tax. In the *Colville* case decided last term, the Court stated, "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[3] Section 398c is precisely that "federal law" which has divested the tribes on Executive Order reservations of any power to tax which they might otherwise have enjoyed.

Although Section 398c is stated in permissive terms, *i.e.*, "Taxes *may* be levied and collected by the state. . .," it is clear from the Legislative history that Congress intended thereby to permit the States, if they should so desire, to levy taxes upon production of minerals on Executive Order Indian reservations, and this opportunity was to be exclusive, while reserving to the respective Tribes all the income from the accompanying rentals, royalties and bonuses in 25 U.S.C. §398b. This division of income constituted a purposeful, delicate weighing of interests by Congress, and the resolution of those competing interests by Congress should not be disturbed by this Court.

Carl Hayden, the sponsor of the bill in the House of Representatives, made clear that the intent of the bill was to allow the mineral development of Executive

---

[3] Washington v. Confederated Tribes of the Colville Indian Reservation, 65 L.Ed. 10.28 (1980).

Order Indian lands and to insure an equitable apportionment of the revenues generated thereby.[4] Congressman Hayden was clearly concerned that the Indians on Executive Order reservations were not receiving any income from the leases which had been issued on their lands under the General Leasing Act of 1920, 41 Stat. 139 (1920):

> Commissioner [of Indian Affairs] Burke. To make that a little clearer, what the bill you are describing was proposed to do, was to give to the Indians the share of royalties that were going to the reclamation fund and to the United States Government. The Indians were not getting anything.
>
> Mr. Hayden. The money had not been actually distributed as you have described, but the law designated that it should be divided that way. Every one felt that it was not right to take all of the money that came from the Executive order reservations without the Indians receiving a cent of it.[5]

Why was federal legislation necessary to provide for income to the Indians who were not "receiving a cent" of benefit from the leasing, if all they had to do was enact a tax? The answer is that the Tribes could not lawfully enact such a tax, and the 1927 compromise legislation is based on that assumption by Congress.

In addition to insuring that the Indians received a share of the income from mineral leases, something which they were not receiving at all under the permits issued pursuant to the General Leasing Act of 1920, 41 Stat. 139 (1920), Congressman Hayden was concerned,

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[4] *Leasing of Executive Order Reservations: Hearings on H.R. 9133 Before a Subcomm. of the House Comm. on Indian Affairs*, 69th Cong., 1st Sess. 8-10 (1926).

[5] *Id.*, at 10.

along with other members of Congress, that an equitable sharing of that income be effected between the Tribes and the States. There was much discussion concerning whether the income to the State should be in the form of a percentage of the bonuses, rentals and royalties or in the form of a tax levied by the State. For instance, Congressmen Snyder and Hayden, managers for the House in the conference committee on an earlier draft bill, reported as follows:

> The amendment to the original text of the bill substitutes a definite share in the bonuses, rentals, and royalties from the oil, gas, coal, etc., for the right to tax the production of minerals granted to the State by the House amendment. The percentage to be paid to the State is the same as is now provided in the general leasing act from such minerals when produced on the public domain. There is no limitation in the House amendment upon the tax that might be levied except that it shall be general and the power to tax is the power to destroy.
>
> The precentage to be deposited in the Treasury to the credit of the Indians is equal to a combination of the 10 per cent paid to the United States and the 52 1/2 per cent paid into the reclamation fund as provided in the general leasing act. Out of the Indians' share of 62 1/2 per cent Congress can make appropriations from time to time for all the expenses of administration. The Federal Government should not seek to make a profit from the Indians and they have a more equitable claim to the royalties than the reclamation fund. [6]

Further on in the discussion, we find additional colloquy concerning the choice between reserving to the States a

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[6] *Id.*, at 17.

percentage of the bonuses, royalties and rentals, on the one hand, and the power to tax on the other:

> Mr. Frear. What is the reason that section 1 could not cover all the rights of the Indians as provided by this law of May 29, 1924 [25 U.S.C. §398]? Why is it necessary to provide in this bill for the 37 1/2 per cent and for the 62 1/2 per cent, instead of allowing all oil production from the Executive order reservations to go the same as from the regular Indian reservations?
>
> Commissioner [of Indian Affairs] Burke. What is the reason for it?
>
> Mr. Frear. Why not have it all go alike?
>
> Commissioner Burke. We would be very pleased to have it that way.
>
> Mr. Frear. Why would it not be sufficient, outside the exception of those people who applied for a permit? What is the objection of having section 2 in the bill?
>
> Commissioner Burke. You can not get the legislation unless it is in there.
>
> Mr. Frear. But that would then put the Executive order reservations simply upon the same plane with a treaty reservation.
>
> Commissioner Burke. My answer to that would be this: You have asked a question that affects the situation generally. It might be very desirable from the Indian standpoint to do just what you say, but these States that have these great areas in Indian reservations have discovered they are living under a handicap, in that they have great areas of lands that are not susceptible of taxation. They endeavored some years ago to have legislation by which they would have had something from these areas to reimburse the states for having this liability of so much non-taxable property, and they came in, when the

legislation was proposed, and made a claim that they must have some part of the production or that they would oppose the legislation.

We did the best we could so far as we are concerned. We compromised, and in trying to get some legislation, trying to get something for the Indians, we consented that 37 1/2 per cent might be diverted and would be used for road construction upon the reservations or roads into the reservations or for the education of Indian children. This is a compromise.

Mr. Frear. What would be the particular interest of the state to insist upon that 37 1/2 per cent for road building, unless it was for the benefit of the State roads?

Commissioner Burke. That is for the State —

Mr. Frear. I am trying to ascertain why this 37 1/2 per cent and 62 1/2 per cent — that division — must be accepted by the bureau in order to secure the passage of the bill.

Commissioner Burke. As a matter of compromise.

Mr. Frear. Supposing the State was given 10 per cent, and given it outright, and the balance go to the Indians?

Commissioner Burke. We would be perfectly satisfied.

Mr. Frear. I was going to ask this: There was a law passed. I think it is this law of May 29, 1924 [25 U.S.C. §398], which provides that all the production of oil may be taxed by the State. That law is in force now, as I understand it.

Mr. Hayden. Only oil produced on treaty reservations.

Mr. Frear. But it can be taxed in your State if you pass a law of that kind, can it not?

> Commissioner Burke. I will tell you another thing, Mr. Congressman. You will notice that in this bill it provides, "in lieu of taxes."[7]

It is clear from such discussions as those quoted above that the legislation, when it was finally passed into law, was a compromise regarding the shares of the production going to the Indian and State governments, *and that compromise consisted of giving 100% of the royalties to the Indians and 100% of the power to tax to the States.*

The contention of the Jicarilla Tribe that the Indian Mineral Leasing Act of 1938, 25 U.S.C. Section 396a-396g, impliedly repealed Section 398c is without merit. New Mexico, for instance has exercised its exclusive power to tax the severance of oil and gas throughout the State since 1937,[8] and more than 40 years have passed since the enactment of the Indian Mineral Leasing Act in 1938. If there had been any doubt at the time of enactment of the latter act as to the validity of Section 398c and the exclusivity of the State's power to tax, it would have been asserted long before this. An example of how generally this view is held is the 1977 statement of the American Indian Policy Review Commission, in discussing mineral leases of Indian lands, that "Indians do not both tax and receive royalties. Usually they just receive royalties."[9]

Moreover, there is no reference at all in the 1938 Act to taxation of oil and gas from Indian Lands, much

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[7] *Id.*, at 25-26. For a brief description of the history of the bill in Congress, *see, e.g.*, H. R. Rep. No. 1791, 69th Cong., 2d Sess. 2 (1927).

[8] *See* ch. 103, 1937 N.M. Laws 290.

[9] American Indian Policy Review Commission, Final Report 344 (1977).

less any mention of such taxation on Executive Order Indian lands. If the 1927 Act and 1938 Act are taken as a whole, there is only one provision dealing with the power of the States to tax, Section 398c. Since there is no provision to conflict with 398c, there can be no real question of an implied repeal of 398c. Indeed, a mere change in the administrative relationship between the Tribes and the Secretary of Interior with respect to the handling of reservation mineral leases could not possibly have altered the substantive right of the States to exercise their exclusive power of taxation. In general, there can be no repeal by implication of a specific statute such as Section 398c by a general statute such as the Indian Mineral Leasing Act of 1938 absent a clear intention by Congress to do so. *E.g., Morton* v. *Mancari*, 417 U.S. 535 (1974).

II.

The Decision Of The Tenth Circuit Threatens To Impose Unreasonable Burdens On The Citizens Of The States

The States are also concerned by the effect that the holding of the Tenth Circuit Court of Appeals will have on its citizens. While Indians residing within the State of New Mexico are citizens of the State and may participate in the political process which determines the existence and rate of taxes imposed by the State of New Mexico,[10] the obverse is not true, that is, nonmembers of the Jicarilla Apache Tribe are disenfranchised with respect to the adoption and determination of the rate of Tribal taxes. If the tribes are held to have taxing authority over non-Indians, the disenfranchised non-Indian is at the

[10] *See* Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

mercy of governmental bodies which have no interest in treating him equitably. And if this power exists, the dollar amount of the burden imposed can be increased practically without limit. *Right of the Cherokees to Impose Taxes on Traders*, 1 Op. Att'y Gen. 645 (1824). The potential for abuse is obviously substantial. The primary check that keeps government taxation from exceeding socially acceptable limits is the power of the ballot box, and that check is clearly absent in the case of taxation of non-Indians by the Indian tribes. Once the foot is in the door allowing such taxation at all, the rates are not generally subject to limitation, and any arguments based on present tax rates are merely speculative and can be misleading. For a case involving, the imposition of a 25% tribal tax on top of pre-existing state taxes, *See Crow Tribe of Indians* v. *Montana*, 469 F.Supp. 154 (D. Mont. 1979).

In addition, the States are concerned that the imposition of taxes such as those imposed by the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance will lead to a decrease in the production of oil and gas and significant increases in the energy costs for consumers. The Trial Court found that wells that are presently marginal will be abandoned as a result of the increased burden placed upon them if the proprosed Jicarilla tax is held to be valid (Findings Nos. 34 & 35). Again, once the tax is approved in principle, it may be increased practically without limit.

The increase in energy costs occasioned by additional tax burdens may also be significant, resulting in the imposition of the burden of supporting tribal government on non-reservation consumers.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed and remanded to that court with directions to enter an order affirming the judgment of the District Court for the State of New Mexico permanently enjoining the enforcement of the Jicarilla Apache Tribe's Oil and Gas Severance Tax Ordinance.

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On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON ELECTRIC POWER COMPANY, and DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The Salt River Project Agricultural Improvement and Power District, Arizona Public Service Company, Nevada Power Company, Tucson Electric Power Company, and Department of Water and Power of the City of Los Angeles hereby move for leave to file a Brief of Amici Curiae in support of the petitioners in this case. The proposed brief accompanies this Motion. The amici sought and obtained the consent of the Merrion and Bayless petitioners, the Amoco petitioners, and the Solicitor General of the United States on behalf of the respondent Secretary of the Interior. However, counsel for the Jicarilla Apache Tribe respondent has withheld his consent. Consent to the filing of this brief by the amicus City of Los Angeles was not necessary under Rule 36(4), Rules of the Supreme Court, since it is a political subdivision of the State of California, and the brief is sponsored by the City Attorney. See proposed brief at page 14.

The amici are interested in this case because they own and operate a power plant on the Navajo Indian Reservation and are resisting in separate litigation the imposition of Navajo Tribal taxes. For a more detailed statement, see the following brief at pages 2-3. The amici believe that a discussion of broad policy questions and this Court's opinion in *Washington v. Confederated Tribes of Colville Indian Reservation*, _____ U.S. _____, 100 S. Ct. 2069, 2080-81 (1980) will assist this Court in the proper resolution of one of the questions presented on certiorari. If for any reason this motion is denied, then we ask that this

Court accept for filing the brief which follows on behalf of the City of Los Angeles.

Dated: November 20, 1980.

Respectfully submitted,

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No. 80-11 and 80-15

In the

Supreme Court of the United States

October Term, 1979

J. GREGORY MERRION, et al., *Petitioners,*

v.

JICARILLA APACHE TRIBE, et al., *Respondents.*

AMOCO PRODUCTION COMPANY, and MARATHON OIL COMPANY, *Petitioners,*

v.

JICARILLA APACHE TRIBE, et al., *Respondents.*

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON ELECTRIC POWER COMPANY, and DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES IN SUPPORT OF PETITIONERS

INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amici curiae are joint tenants in the Navajo Project, a $600,000,000 coal-fired electric generation plant, located near Page, Arizona, on the Navajo Reservation. The amicus Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona. The amicus Department of Water and Power of the City of Los Angeles is a department organized and existing under the charter of the City of Los Angeles, a municipal corporation of the State of California. The amici Arizona Public Service Company and Tucson Electric Power Company are public service corporations organized under Arizona law. The amicus Nevada Power Company is a public service corporation organized under Nevada law. Salt River Project owns 21.7% of the Navajo Project for its own benefit and holds 24.3% for the use and benefit of the United States of America intended for use by the Department of the Interior to meet its power needs for the Central Arizona Project. All amici are non-Indian entities. The United States, with the consent of the Navajo Tribe, granted the amici a right-of-way and easement for the project site and related facilities, and the tribe granted the amici an overlapping lease of the same land with the consent of the Secretary of the Interior.

Shortly after the Navajo Project's completion, the Navajo Tribe of Indians adopted resolutions purporting to tax (1) the Project's emission of sulfur compounds, (2) the Project's leasehold, and (3) the Project's gross receipts.

As a result, the amici are parties to litigation in the United States District Court for the District of Arizona challenging the validity of the tax on sulfur emissions.[1] The amount of this tax escalates to about $50,000,000 a year after five years. The amici's challenge to the leasehold interest tax is presently on appeal in the

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[1] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977).

United States Court of Appeals for the Ninth Circuit.[2] Although the amici's claims against the validity of Navajo tribal taxation as to them are many, a claim common to one in this case is that the dependent status of Indian tribes necessarily precludes their assertion of governmental authority over non-member, non-Indian entities.

Of the many questions presented to this Court on certiorari, these amici will limit their presentation to that portion of the holding below characterized as the "basic question" of an Indian tribe's power to impose a tax on non-members of the tribe doing business on a leasehold granted by the tribe within the boundaries of an Indian Reservation. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541-44 (10th Cir. 1980). We submit that because the tribe has no such governmental power, the other questions presented to this Court need not be decided and the judgment of the United States Court of Appeals for the Tenth Circuit must be reversed.

ARGUMENT

The decision below is plain error. The court confused the rights of an Indian tribe as a landowner, with its limited power of self-government over its own members. By mixing these two concepts, the court reached the conclusion that the tribe's power of self-government extended to non-members. To reach this result, the court refused to attribute significance to this Court's decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978), and *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978). 617 F.2d at 542.

We and others have made the argument against tribal taxation of non-members elsewhere. Brief of Amici Curiae, Salt River Project, et al. in this Court in the case of *Washington v. Confederated Tribes of Colville Indian Reservation*, No. 78-630; *I American Indian Policy Review*

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[2] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. 78-3492 (9th Cir., argued on Nov. 12, 1980, decision pending).

Commission, Final Report 583-96 (1977) (separate views of L. Meeds); *Martone, Of Power and Purpose*, 54 Notre Dame Law. 829 (1979). It is there shown that an Indian tribe is without civil regulatory authority and jurisdiction over non-members and that this Court's decisions in *Oliphant, supra,* and *Wheeler, supra,* permit of no other principled conclusion. It was shown that of all the treaties which addressed the issue, each uniformly excluded tribal civil jurisdiction over non-members. *See, e.g., Martone, supra,* 54 Notre Dame Law. at 837, n. 50. And, it was shown that all the cases relied upon by the Court below in this case, simply do not support tribal governmental power over non-members.

We thus limit our participation here to a general but brief discussion of how tribal taxation of non-members jeopardizes the most fundamental interests of the American body politic. We also discuss this Court's recent remarks in *Washington v. Confederated Tribes of Colville Indian Reservation,* _____ U.S. _____, 100 S.Ct. 2069, 2080-81 (1980).

I. TRIBAL TAXATION OF NON-MEMBERS VIOLATES THE SOCIAL CONTRACT AND, IF PERMITTED, WOULD BE THE ONLY SOURCE OF GOVERNMENTAL POWER WITHIN THESE UNITED STATES WHICH COULD BE EXERCISED WITHOUT LAWFUL RESTRAINT.

Since the ratification of the United States Constitution, the American social contract has been between its citizens, the United States, and the several states. Thus, at least within the boundaries of the United States, Americans have consented to state and federal governmental power over their liberty and their property. Because of the obvious potential for abuse the American people insisted upon two fundamental principles. First, government would be controlled by the people through the democratic process. A second and equally important principle was that the exer-

cise of federal and state governmental power would be subject to certain constitutional limitations. This Court's major work has been to resolve disputes in which these two important interests are at stake.

Tribal taxation of non-members does violence to both principles. Non-members have never consented to government by Indian tribes, and, in this country at least, "each sovereign governs only with the consent of the governed". *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 1191 (1979). Non-members of the tribe by definition cannot participate in the exercise of tribal governmental power. Unlike the states in the United States, the tribe purports not only to be a government, but is the owner of communal property in which only its members share an interest. The assertion of governmental power by Indian tribes over their own members creates no problem since members participate in tribal governmental power and have an interest in tribal communal assets. Moreover, they have consented to tribal government through their own social contract with the tribe. This can hardly be said of non-members.

This is profoundly important. The normal democratic political control over the exercise of governmental power is absent when an Indian tribe seeks to assert governmental power over non-members. Thus, an Indian tribe has no incentive to exercise governmental power over non-members with justice or wisdom. For example, the Navajo taxes attacked by amici are applicable only to non-Navajos. This should come as no surprise since the human ability to exercise governmental power unjustly was the very basis for the creation of lawful restraint on that power under our federal constitutional scheme.

This leads us to the second hallmark of the American body politic. In our scheme, the exercise of federal and state governmental power is constrained not only by the implicit political checks of democratic control of power, but also by external constraints contained in our organic law. The United States Constitution constrains the governmen-

tal power of the United States and the states, and the state constitutions further constrain the powers of the states. Ever since *Talton v. Mayes*, 163 U.S. 376, 16 S.Ct. 986 (1896), this Court has held that the limitations imposed upon the United States by the Bill of Rights do not operate to limit the exercise of tribal governmental power over its own members. *See, United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079 (1978). Nor does federal or state jurisdiction exist to entertain claims brought by Indians under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, seeking to enforce statutory restraints on the exercise of tribal power. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978). While this state of the law may not upset a tribal member's expectations of external restraint on the control of tribal governmental power, it certainly collides with the non-members' expectations of the sanctity of civil liberties under our constitutional scheme. It begs the question to suggest that a non-member pursue his federal claims through a tribal forum. The tribe is the very agency whose conduct is attacked. Separation of powers is a concept foreign to tribal government. Moreover, there is no state or federal court judicial review of a tribal forum's adjudication of federal rights under the Indian Civil Rights Act. Thus, the determination of substantial *federal* rights would not be subject to judicial review by an Article III federal court, including this one. This would mean that for a non-member the Act is a nullity.

Thus, for this Court to uphold tribal taxation of non-members on an Indian Reservation, it would have to conclude that there is within the United States of America governmental power which is neither subject to democratic control, nor external lawful restraint. This does violence to the most fundamental assumptions Americans share about the exercise of governmental power within the United States.

These principles are at stake in the case before this Court. For unlike the cigarette purchasers in *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* the petitioners here are lawfully present on the reservation under lease with the tribe. As a landowner, the tribe has set the conditions of entry and has memorialized them in the lease between the parties. That these principles are not mere abstractions can best be shown by a comparison of their interests with those of the non-Indians in *Colville, supra.*

II. THIS CASE IS NOT *COLVILLE*

A. Colville Is A "Condition of Entry" Case, And Has No Application To Those For Whom The Conditions Of Entry Have Already Been Set.

In *Colville, supra,* this Court held that a state could require a tribe to add a state's tax to cigarettes sold by the tribe to non-members even where the tribe added its own tax to the transaction. In reaching this result this Court commented on tribal taxation very generally. 100 S.Ct. at 2080-81. But *Colville* was a pure condition of entry case, and in no way supports tribal governmental power over non-members.

The choice of the non-member was clear. A typical commercial transaction, he could either buy the cigarettes at the price the tribe chose to sell them, including the tribal tax, or he could buy his cigarettes elsewhere. 100 S.Ct. at 2083. The tribe was a party to the transaction and the tax was of the sort that could never be enforced for non-payment in tribal court or elsewhere because the payment of the tax was the condition precedent to the sale of cigarettes. Thus, the transaction in the *Colville* case involved a tax only in the broadest sense in which that word is used. No sanctions were or could have been involved, and no prior dealings with the tribe were implicated. It was a pure condition precedent to a sale case, akin to the condition of entry cases discussed at length in Martone, *supra,* 54 Notre Dame Law. 838-42. Indeed, the authority upon which this

Court relied involved the tribe's power to condition entry on the payment of a fee, the failure of which resulted in the single sanction of exclusion or removal from the reservation. This concept is best summed up by the solicitor's opinion cited by this Court in *Colville:*

> Except where Congress has provided otherwise, this power [of taxation] may be exercised over members of the tribe *and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.* 100 S.Ct. at 2081, citing *Powers of Indian Tribes,* 55 I.D. 14, 46 (1934). (Some emphasis the Court's, some emphasis added).

Note that that portion of the statement relating to members of the tribe is phrased in absolute language while that portion of the statement relating to nonmembers includes the attachment of condition of entry language.

Similarly, this Court in *Colville* characterized cases acknowledging the tribal power to tax as involving "non-Indians *entering* the reservation to engage in economic activity." 100 S.Ct. at 2081 (emphasis added). The Court said no federal statute cited to it showed any congressional departure from this view. Yet we have examined every Indian treaty and have found that all treaties which secure the right of self-government to Indian tribes, including civil power over persons and property, exclude jurisdiction over persons (and their property) who are not by birth, adoption or otherwise citizens or members of the tribe. Treaty with the Cherokee, art. 5, 7 Stat. 478 (1835); Treaty with the Choctaw and Chickasaw, art. 7, 11 Stat. 611 (1855); Treaty with the Creeks, art. 15, 11 Stat. 699 (1856); Treaty with the Seminole, art. 2, 14 Stat. 755 (1866).[3] Cf. Treaty with the Chickasaw art. III, 7 Stat. 450 (1834); Treaty with the Comanche, et al., art. 2, 9 Stat. 844 (1846); Treaty with the Navajo, arts. VI, IX, 9 Stat. 974 (1849). As to treaties with

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[3] The relevant articles of these four treaties are reproduced in the Appendix to this brief.

tribes in the Indian Territory (Oklahoma), e.g., Treaty with the Choctaw and Chickasaw, 14 Stat. 769 (1866), and Treaty with the Cherokee, 14 Stat. 799 (1866) see *Ex parte Mayfield*, 141 U.S. 107, 11 S.Ct. 939, 941 (1891). The scheme in the Indian Territory vested civil jurisdiction in tribal courts over actions in which only Indians were parties. Any action to which a non-member was a party was to be brought in federal court. *Id.* at 941. Act of May 2, 1890, §§ 30, 31, 26 Stat. 81, 94. *Alberty v. United States*, 162 U.S. 499, 503, 16 S.Ct. 864 (1896). See generally F. Cohen, *Federal Indian Law* 382 (U.N.M. ed. 1942). There could be no better proof of the shared understanding of the executive and the congressional branches than these treaty and statutory provisions.

Thus it is clear that the tribal power to tax acknowledged in *Colville* was based upon the proprietary power to exclude or condition entry—a power these treaties and statutes acknowledge.[4]

But what of non-members, as those here, whose "conditions" with respect to their "entering the reservation" have already been established by lease? The *Colville* dicta does not support taxation in such instances. Indeed, the only inference to be drawn from the *Colville* dicta and its emphasis on conditions of entry is a negative one. For example, in stating that the power of the tribe to add its tax to the sale of cigarettes was not divested by virtue of the tribe's dependent status, this Court noted that such a divestiture occurs in cases where the exercise of tribal governmental power is inconsistent with the overriding interests of the national government, 100 S.Ct. at 2081, and gave as an illustration the prosecution of non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. *Id.* This Court noted that "[i]n the present case" it saw no overriding federal interest that would necessarily be frustrated by tribal taxation. *Id.* This was so

[4] Of course, where, as here, the conditions have been set, they cannot be unilaterally changed or else the lease would not be a lease.

because the tax in *Colville* was not a true tax at all. The interests of non-Indians could never have been implicated in tribal proceedings either administrative or judicial "which do not accord the full protections of the Bill of Rights". *Id.* The non-member's interests in the democratic control of governmental power and in constitutional limitations on its exercise were not implicated.

The case before this court is far different from that in *Colville.* Here, the conditions of entry have been set and are clearly delineated in the lease. Moreover, the petitioners do not have the freedom to choose not to "buy the cigarettes". They have federal rights to be on the reservation and cannot be asked to "possibly travel elsewhere". *Colville,* 100 S.Ct. at 2083. The tax in this case purports to subject the petitioners to tribal processes "which do not accord the full protection of the Bill of Rights". *Id.* at 2081. It would be a curious perversion of *Colville* to permit the very result which this Court used to illustrate those instances in which the tribe's dependent status has resulted in a divestiture of tribal power. Here, the non-members' interests in democratic control of governmental power and constitutional limitations are highly implicated.

In *Colville,* this Court recognized that the relevant treaties involved could "be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter; but purchasers entering the reservation are not the State's agents and any *agreements* which they might make cannot bind it." 100 S. Ct. at 2082 (emphasis added). Thus, it is clear that this Court upheld the tribal power to add its tax to the sale of cigarettes because the tribe could exclude those non-Indian purchasers or impose conditions on their entry. It regarded the non-Indian's purchase of cigarettes as an "agreement" to pay the tax. But here, the petitioners did not agree to pay the tax nor can they be excluded from their leasehold which sets forth the

very conditions imposed by the tribe for their initial entry. Thus we submit that the *Colville* dicta does not support tribal governmental power over non-members of the sort asserted here.

To summarize, *Colville* was a condition of entry case. Its dicta is not applicable here because if applied, the very evils this Court noted were absent in *Colville* would result here. But, even if one would attribute to the *Colville* dicta a broadness of application not warranted by its facts, the tribe has no "significant interest in the subject matter" to tax the activities of the petitioners, and there is here an "overriding federal interest that would necessarily be frustrated by tribal taxation." 100 S.Ct. at 2081. It is to this second argument that we next turn.

B. The Tribe Has No Significant Interest In The Leasehold, and Even If It Did, There Is An Overriding Federal Interest That Would Be Frustrated By the Tribal Tax

The *Colville* dicta is most general. This Court said that the *general* power to "tax" transactions on reservations significantly involving a tribe is not divested "by federal law or necessary implication of their dependent status". 100 S.Ct. at 2081. That general power was held not to be completely ousted there because the cigarette tax was not "inconsistent with the overriding interests of the National Government." *Id.*

Thus, even reading *Colville* most expansively the question remains whether, in any specific context, tribal taxation of non-members *is* divested by (1) its lack of significant interest in the subject matter or (2) by specific federal law, either by the letter of federal law or because the tribal taxation would be "inconsistent with the overriding interests of the National Government." *Id.*

(1) *The Tribe Has No Significant Intertest.*

Absent an overriding federal interest, the *Colville* dicta authorizes tribal taxation of transactions or activities on trust lands in which the tribe has a significant interest. *Col-*

ville, 100 S. Ct. at 2081. Yet here the tribe's interest in the land has been extinguished by the lease for the duration of its term. Hence, the tribe's interest in the leasehold is insufficiently significant to justify the tax even under the *Colville* dicta's most expansive interpretation.

(2) *The Tribal Power is Ousted by an Overriding Federal Interest.*

Even assuming the tribe somehow had a significant interest in a leasehold which extinguishes its interest, tribal power to tax is ousted by the overriding federal interest in federal control of leases of lands to which it holds the fee.

It is apparent that the Jicarilla tax would impermissibly disrupt federal laws, interests, and policies. Specifically, the federal interest embodied in the Indian land leasing statutes and regulations is an "overriding federal interest that would necessarily be frustrated by tribal taxation" on the leasehold granted under the federal statutes and regulations.

The petitioners are on the reservation under a comprehensive federal statutory and regulatory scheme which leaves no room for tribal taxation. We leave the substance of this argument to the petitioners, but mention that the treatment of this issue by the court below is unpersuasive in the extreme. *See, Merrion V. Jicarilla Apache Tribe*, 617 F.2d 537, 548-49 (10th Cir. 1980).

The Jicarilla tax at issue in this case is nothing more than an attempt to unilaterally raise the rents or other compensation required under the leases previously negotiated and consummated under federal authority. Gas and oil taken by the tribe is exempt from taxation. This attempt by the tribe to unilaterally revoke the agreed upon and federally approved consideration for reservation leases is plainly violative of the "overriding federal interest" in determining and regulating the compensation to be exacted from reservation lessees.

This plain and literal conflict between, on the one hand, the tribe's unilateral attempts to change the economics of federal leases and, on the other, the exclusive federal administrative responsibility for fixing the consideration for such leases at the outset threatens in a general way the federal policy of inducing on-reservation investment. As in any other business activity, it is essential in order to induce investment that the investor have some reasonable notion of his costs. Tribal taxation of federal leases destroys totally the bargained for rent and the certainty of an investor's liability for his lease on the reservation. Instead, he is placed in a position where, after having invested substantial resources in fixed assets on the reservation, he is at the mercy of the tribe's unilateral decision to raise the rent for the lease to whatever extent the tribe chooses.

Obviously, this result, if allowed, would totally frustrate the federal policy of inducing investment on Indian reservations through the leasing statutes. No rational investor would enter into such an arrangement. There is no possibility of participating as a citizen in the deliberative processes leading to a decision to tax. There are no constitutional limits on the exercise of tribal power. There is no federal judicial review of federal questions which might be heard or determined before tribal courts. In short, he would be subjected to unbridled lawlessness of the sort long thought impossible within these United States.

III. CONCLUSION

Many non-Indians live on Indian reservations and others do business there. The assertion of tribal governmental power over them violates the social contract, does violence to the notion of democratic control over governmental power and subjects such persons to the deprivation of fundamental rights in ways not possible if the power itself were subject to constitiutional limitation. Federal rights could be lost or adjudicated in tribal forums with no possibility of federal or state judicial review.

The tribe is a government for its members. As to non-members it is a mere landowner. As such, the tribe can achieve its legitimate economic objectives by contract with non-members. If the non-member is willing to meet the tribe's terms, the tribe's economic objectives are by definition satisfied. There is thus no compelling policy reason to sacrifice the civil liberties interests of non-members on the altar of tribal taxation. The judgment of the United States Court of Appeals for the Tenth Circuit must be reversed.

Respectfully submitted,

November, 1980

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CERTIFICATE OF SERVICE

I, Frederick J. Martone, one of the attorneys for the amici curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing motion and brief; specifically, that on November 20, 1980, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing motion and brief of amici curiae addressed to each of the following:

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TREATY WITH THE CHOCTAW AND CHICKASAW, 1855.

ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe,* and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, *without becoming citizens or members of either of said tribes.* (emphasis added).

TREATY WITH THE CREEKS, ETC., 1856

ARTICLE 15. So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; *excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe;* and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits *without becoming members of either of said tribes.* (emphasis added).

TREATY WITH THE SEMINOLE, 1866.

ARTICLE 2. The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, *who may be adopted as citizens or members of said tribe.* (emphasis added).

TREATY WITH THE CHEROKEE, 1835

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; *and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (emphasis added).

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

October Term 1980

J. GREGORY MERRION, *ET. AL.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *ET. AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICI CURIAE

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

October Term 1980

J. GREGORY MERRION, *ET. AL.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *ET. AL.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICI CURIAE

Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas, Anadarko Production Company and Texaco, Inc., respectfully move for leave to file a brief *amicus curiae* in these cases. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The interest of these movants in this case arises from the fact that they are parties to similar cases pending in the Court of Appeals for the Tenth Circuit. *Southland Royalty Company et al. v. Navajo Tribe of Indians, et al.*, Nos. 80-2035, 80-2036, 80-2037, 80-2038 and 80-2767 (10th Cir., docketed Oct. 2, 1980.) In the *Southland* cases these movants challenge the validity of two taxes imposed by the Navajo Tribal Council upon the value of movants' oil and gas leaseholds and their receipts from production on portions of the Navajo Reservation in Utah. In the *Southland* cases, movants place before the Tenth Circuit several of the issues before this Court in the present case. The common issues are: (1) whether Indian tribes may constitutionally tax production of oil and gas by non-Indians, in the absence of congressional approval; (2) whether such tribal taxation is lawful where it is not imposed as a condition of entering on Indian lands in leases approved by the Secretary of the Interior; (3) whether 25 U.S.C. §398c prohibits tribal taxation of oil and gas production on Executive Order reservations; (4) whether federal regulatory control over oil and gas production preempts tribal taxation of such production; (5) whether constitutional standards of due process and equal protection limit any tribal power of taxation over non-Indians; and (6) whether concurrent state and tribal taxation of oil and gas production unlawfully burdens interstate commerce.

In the present case before the Court of Appeals, petitioners did not address the issue whether Congress has preempted independent tribal taxation by regulat-

ing, in a comprehensive fashion, oil and gas leasing and production on tribal lands. The Court of Appeals nevertheless concluded that a tribe duly organized under the Indian Reorganization Act, 25 U.S.C. §§476 and 477, may lawfully regulate—and therefore tax—oil and gas leases on tribal lands, pursuant to 25 U.S.C. §396b. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 548-49 (10th Cir. 1980). Implicit in the decision of the Court of Appeals is the conclusion that tribes (like the Navajo Tribe) that are not organized under pertinent acts of Congress may be preempted by comprehensive regulation. In their petition to this Court, the petitioners have indicated that they intend to *combine* their arguments relating (1) to exclusive state taxation of oil and gas production on Executive Order reservations and (2) to federal preemption of oil and gas leasing operations on tribal lands.

These movants believe that the question of exclusive state taxing jurisdiction and the question of federal preemption are separate and should be developed separately. If petitioners approach the issues in this Court as they did in the Court of Appeals, the federal preemption question will receive little attention in their briefs. For these reasons, movants believe that the brief they seek leave to file will address the preemption issue more completely than will petitioners. If movants' arguments on this question should be accepted by the Court, this case would thereby be decided in its entirety.

The Navajo Reservation, on which these movants conduct oil and gas operations, covers some 14.5 million

acres of land in Utah, Arizona and New Mexico. It is thus nearly twenty times larger than the Jicarilla Apache Reservation, which covers 750,000 acres in New Mexico. The volume of oil, gas and mineral production from the Navajo Reservation is proportionately greater than production from the lands of the Jicarilla Apache Tribe. For example, in 1975 the Navajo Reservation yielded more than 10 million barrels of oil, while the Jicarilla Apache Reservation yielded less than 412,000 barrels of oil. (Sources: Navajo Nation Office of Minerals Development and U.S. Geological Survey.) Thus, the consequences of tribal taxation will not be isolated to the lands of the Jicarilla Apache Tribe. The Court's decision in these cases will have enormous economic impact upon the many producers of energy, including movants, on the Navajo Reservation and upon the millions of persons who use that energy. Moreover, since all oil and gas sold from movants' leases on the Navajo Reservation is sold in interstate commerce, the consequences of tribal taxation will not be limited to the environs of the JicarillaApache Reservation or the Navajo Reservation, but will be national in scope.

To the extent that this Court's decision should hinge in whole or part upon the economic and commercial consequenes of unfettered tribal taxation movants believe that their brief will broaden the Court's understanding of those consequences.

Respectfully submitted,

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Nos. 80-11 and 80-15

In the Supreme Court of the United States

October Term 1980

J. GREGORY MERRION, *ET AL.*,
Petitioners,

v.

JICARILLA APACHE TRIBE, *ET AL.*
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE

Shell Oil Company, Chevron U.S.A., Inc., The Superior Oil Company, The Union Oil Company of California ,Wilshire Oil Company of Texas, Anadarko Production Company, and Texaco, Inc., respectfully submit this brief as amici curiae in support of the position of petitioners in these cases.

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INTEREST OF AMICI CURIAE

Shell Oil Company, Chevron U.S.A., Inc., Texaco, Inc., The Superior Oil Company, The Union Oil Company of California, Wilshire Oil Company of Texas and Anadarko Production Company are producers of oil and gas from portions of the Navajo Indian Reservation situated in the southern part of Utah. The oil and gas leases from the Navajo Tribe under which these amici operate on that reservation were approved by the Secretary of the Interior. The leases provide for the payment of bonuses, rents and royalties to the Tribe, all of which amici have paid — in some instances for more than 25 years — for the right to extract oil and gas from tribal lands. In 1978, the Navajo Tribal Council legislated a "Business Activity Tax" and a "Possessory Interest Tax," both under color of its asserted sovereignty to govern non-Indians doing business on the reservation. The Navajo taxes are directed primarily at non-Indian producers of oil, gas, coal, uranium and electric power, all of whom conduct their business under pre-existing leases or other instruments approved by the Secretary of the Interior.

The decision of the Court of Appeals in these cases unmistakably suggests that the Navajo Tribe may ignore its lease covenants and may tax oil and gas production on the reservation without restraint. Our interest in these cases stems from a desire to continue production on the Navajo Reservation under the terms and conditions approved by the Secretary. If the Court of Appeals was right, and if tribes like the Navajo may tax producers unfettered by their leases or the Constitution, then

multi-million dollar investments made by these amici will be of doubtful value.

The problems generated by tribal taxation of oil and gas producers are not isolated to the Jicarilla Apache Reservation or the Navajo Reservation. These problems are national in scope for two reasons. First, Indian tribes in many parts of the nation own lands rich with natural resources. The Crows, the Blackfeet, the Osage, the Shoshone, the Arapahoe the Utes, the Sioux, the Hopi, the Laguna, the Papago and many other tribes in the West lay claim to vast reserves of valuable minerals. Each of these tribes has either promulgated taxes on producers or is encouraged to do so by the decision of the Court of Appeals.

Second, the oil, gas and other minerals produced from these reservations are usually sold and used in interstate markets. In fact, all of the oil and gas produced and sold by these amici from the Navajo Reservation is sold in interstate commerce. The Navajo Tribal Council characterizes the Navajo Nation as "a principal supplier of crucial energy resources critical to the development of the United States economy."[1] As well it might: between 1968 and 1975 Navajo tribal lands yielded more than 100 million barrels of oil, more than 64 million tons of coal, and more than 105 million cubic feet of natural gas. Amici already pay state taxes on their production of these resources and on property entailed in production. The addition of tribal taxes on

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[1] "Navajo Energy Policy", adopted by the Navajo Tribal Council as Resolution CAP-34-80 (April 29, 1980).

their property and production places amici at a distinct commercial disadvantage with respect to competitors who produce oil and gas from non-tribal lands. Tribal taxation discourages the massive investment necessary to finance sophisticated, enhanced recovery of hard-to-reach oil reserves; in the long run tribal taxes will prevent the development of resources that otherwise would be sold to consumers nationwide.

SUMMARY OF ARGUMENT

Federal regulation of oil and gas leasing and operations on restricted Indian lands is, as Congress intended it to be, comprehensive. Any attempt by a tribe of Indians to tax tribal leases or production from tribal lands interferes with the federal regulatory scheme. Just as the states are preempted from intruding upon areas regulated pervasively by the United States, so the tribes are proscribed from exercising their sovereign powers in a manner inconsistent with national interests implicit in federal statutes. Tribal taxation necessarily conflicts with the national interests (1) in uniform regulation of oil and gas production from tribal lands and (2) in the continued viability of the program of tribal leasing mandated by Congress. Pertinent federal statutes cannot be read to authorize a delegation to tribes of the power to tax oil and gas lessees.

Tribal taxation of oil and gas production impermissibly burdens interstate commerce. Assessed only against oil and gas sold or transported off the reservation, tribal taxes unlawfully provide a direct commercial advantage

to the tribe and its members. Concurrent tribal and state taxes on production from the reservation result in an unapportioned multiplication of taxes by independent sovereigns, in violation of the Commerce Clause of the Constitution.

ARGUMENT

I. *FEDERAL REGULATION OF OIL AND GAS LEASING AND PRODUCTION ON TRIBAL LANDS PREEMPTS TRIBAL TAXATION*

The petitioners in these cases assert that Congress has preempted tribal taxation of oil and gas production on Executive Order Indian reservations by (1) granting to the States the power to tax such production in 25 U.S.C. §398c and (2) granting to the Secretary of the Interior comprehensive authority to regulate tribal leasing of oil and gas properties and the production from such properties.[2] Amici believe that the issue of federal preemption is independent of this Court's construction of 25 U.S.C. §398c. That is, regardless whether section 398c is construed to constitute an exclusive grant of taxing power to the States, the pervasive character of federal regulation over tribal leasing and production preempts tribal taxation.

A. *Federal Regulation of Oil and Gas Leasing and Operations is Comprehensive*

The power of the United States to regulate com-

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[2] See **Petition For Writ of Certiorari of J. Gregory Merrion, Robert L. Bayless et al. (July 1, 1980) at 17-21.**

merce with Indian tribes derives from Article I, Section 8, Clause 3 of the Constitution. *White Mountain Apache Tribe v. Bracker*, 100 S.Ct. 2578, 2583 (1980). The power of Congress so conferred is exclusive and plenary. *Perrin v. United States*, 232 U.S. 478, 483 (1914); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). With this constitutional authority, Congress has charged the Secretary of the Interior with the duty to approve all leases of any restricted Indian lands, whether tribally or individually owned; all such leases must be made "under such terms and regulations as may be prescribed by the Secretary of the Interior." 25 U.S.C. §415. In 1938, Congress enacted the Indian Mineral Leasing Act, 52 Stat. 347 (codified at 25 U.S.C. §396a-396g) in order to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). In that Act, Congress directed the Secretary to promulgate rules and regulations covering "[a]ll operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Mineral leases of tribal lands, according to the Act are to be made only with the approval of the Secretary, *id.* §396a, and the Secretary may in his discretion reject any bid for such leases.[3] *Id.* §396b. The Act was intended to be the "comprehensive law covering mineral leases on unallotted land." *F.S. Cohen, Handbook of Federal Indian Law* 328 (G.P.O. ed. 1940).

[3] Note, however, that section 2 of the Act, 25 U.S.C. §396b, enables tribes organized under the Indian Reorganization Act, 25 U.S.C. §§476 & 477, to lease lands for mining purposes in accordance with federally approved tribal constitutions.

Pursuant to Congress's broad directive, the Secretary has promulgated a comprehensive array of regulations to cover virtually every aspect of the acquisition of oil, gas and mineral leases from tribes, the terms of such leases, the timing of payments under such leases, operations cancellation and assignment of such leases, safety, disposal of waste products restoration of surface mining sites, unitization and cooperative development of leased properties, and mining and processing methods. The Secretary's regulations codified in Parts 171 through 177 of Title 25 of the Code of Federal Regulations cover the leasing of tribally-held lands for oil, gas and mining purposes (Part 171), the leasing of allotted lands for such purposes (Part 172), mineral leasing of lands on specified reservations (Parts 173-176), and surface exploration, mining and reclamation of tribal lands (Part 177). In addition, the United States Geological Survey has, at the direction of the Secretary, promulgated operating regulations for the exploration, development and production of coal and other minerals on tribal lands in Parts 211 and 231 of Title 30 of the Code of Federal Regulations. Those regulations, which by their terms apply to both tribal and allotted Indian lands (*see* 30 CFR §§211.1(a) and 231.1(a)), cover operating plans, mapping, testing, maximum recovery amounts, safety, mining methodology, milling and record-keeping, and reclamation, among other matters.

In particular detail, the Secretary's regulations prescribe the per acre rent and percentage royalty to be included in the terms of oil and gas leases covering restricted tribal lands. (25 CFR §171.13) Higher

rates of royalty may be paid to the tribal lessor only if "fixed by the Secretary of the Interior or his authorized representative proir to the advertisement of land for oil and gas leases." (*Id.* §171.15) The regulations also prescribe the methods by which the value of hydrocarbons may be ascertained for computation of royalties (*id.* §171.13), and the manner and time for making rental and royalty payments. (*Id.* §§171.12 and 171.16) The same regulations require advance Interior Department approval of any operations under such leases (*id.* §171.20), reserve the right of the Secretary to restrict operations (*id.* §171.21), and require Secretarial approval of assignment and cancellation of leases. (*Id.* §§171.26 and 171.27)

The regulations in Part 171 serve two obvious purposes that reflect Congress's manifest intent in passing the Indian Mineral Leasing Act of 1938. First, the regulations create a uniform scheme for the acquisition and development of "[a]ll operations under any oil, gas or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands." 25 U.S.C. §396d. Second, the regulations discharge the trust responsibility of the United States to the tribes, by subjecting leases to the scrutiny of the Secretary's designee, by requiring detailed financial information from applicants, and by fixing fair terms of compensation to the tribes.

The Secretary's regulations also carefully protect the rights of private lessees. The regulations provide that lessees may not be "held liable for loss or destruc-

tion of . . . oil . . . by causes beyond the lessee's control." (*Id.* §171.13) They provide that gas produced from leases may only be used by the tribal lessor if the lessee's requirements for development and operation of the leases have been met. (*Id.*) Most significantly, the regulations prohibit any escalation in the percentage royalty to the tribal lessor after advertisement of the lease for bid. (*Id.*) Elsewhere the regulations prohibit the application of any new regulations, after Secretarial approval of the lease, that would "operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." (*Id.* §171.28) In protecting the lessees of tribal lands from unconsented changes in the tribe's remuneration, the Secretary's regulations ensure the continued viability of operations under tribal leases. If the tribes are free unilaterally to increase their share of the proceeds from oil and gas operations, Secretary-approved leases mean nothing, and the lessees' incentive to continue investing and operating is removed.

B. *Federal Regulation of Oil and Gas Operations on Tribal Lands Preempts Tribal Taxation of the Leases and Production of Lessees.*

The decisions of this Court on the limits of state and tribal authority lead directly to the conclusion that no sovereign—whether a state or a tribe—subordinate to the United States may lawfully regulate an area of commerce so prevasively regulated by Congress as the leasing and production of minerals on Indian lands. Just as the states are preempted from intruding upon the regulatory authority of the United States, so the tribes

are divested of the power to regulate in a manner "inconsistent with the overriding interests of the National Government." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069, 2081 (1980). The interests of the national government implicit in the Indian Mineral Leasing Act of 1938 and in the Secretary's regulations are plainly inconsistent with the tribes' attempts to tax private lessees.

1. *Federal preemption of tribal commerce*

In *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), the Court addressed the question whether Congress's delegation of authority to the Commissioner of Indian Affairs to regulate trading on the reservations preempted state taxation of traders. The Court reviewed the Commissioner's "detailed regulations" concerning traders and concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

380 U.S. at 690. The Court held:

> "Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's . . . because Congress in the exercise of its power granted in Art. 1, Section 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject."

Id. at 691 n.18.

In *White Mountain Apache Tribe v. Bracker, supra,* this Court's most extended discussion of federal preemption in tribal matters, two Arizona motor vehicles taxes were struck down because, it was held, the taxes were preempted by federal law. 100 S.Ct. at 2581. At the outset of its decision, the Court cautioned that the scope of federal preemption in this unique area is "not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 2584. With that principle before it, the Court observed that federal regulation of the harvesting of Indian timber is "comprehensive." *Id.* Those regulations, together with federal regulations governing roads developed by the Bureau of Indian Affairs, convinced the Court that "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by Arizona. *Id.* at 2586.

Certainly *White Mountain Apache* and *Warren Trading Post* dealt with federal preemption of *state* authority, and not tribal authority. The question that these cases pose in the present context is whether pervasive federal regulation of tribal commerce — specifically the leasing and resource development of tribal lands — overrides tribal taxation of non-Indian lessees. In short do these same preemptive restrictions against state action also limit tribal action? And if so, are tribal taxes

preempted by federal regulations of mineral leasing and operations on tribal lands?

2. *Divestiture of tribal sovereignty*

The Court has held on many occasions that tribal sovereignty must yield to the overriding interests of the United States. For example, in *United States v. Wheeler*, 435 U.S. 313 (1978), the Court held that the Fifth Amendment's double jeopardy clause does not bar a tribal member's prosecution in federal court, notwithstanding a previous conviction in the Navajo tribal court arising from the same incident. Acknowledging that the Navajos possess a "right of internal self-government," *Wheeler* nevertheless concluded: "Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others." 435 U.S. at 323.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that Indian tribes lack jurisdiction to try non-Indians for criminal offenses in the absence of an affirmative grant of power by congressional statute or treaty. As the basis for its decision, the Court relied upon the proposition that tribes are proscribed from exercising "power inconsistent with their status" as dependents of the United States. 435 U.S. at 208. In particular, the Court observed:

> "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."

Id. at 209.

This Court's most recent discussion of the boundary between permissible tribal action and the "overriding sovereignty" of the United States, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 100 S.Ct. 2069 (1980), considered whether tribes with constitutions approved by the Secretary of the Interior have the power to tax cigarette sales to non-Indians occurring on tribal trust lands. Acknowledging the rules set forth in *Wheeler* and *Oliphant, supra,* the Court stated:

> "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.
>
> * * *
>
> *"This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . ."*

100 S.Ct. 2080-81 (emphasis added). Since the Court could find in the facts before it "no overriding federal interest that would necessarily be frustrated by tribal taxation," the Court upheld the taxes. The Court, how-

ever, emphasized that "tribal sovereignty is dependent on and subordinate to . . . the Federal government." *Id.*

The instant case presents precisely those facts, absent from *Colville,* which argue most forcefully for "divestiture" of tribal sovereignty. In this case, the tribe has asserted its taxing jurisdiction in an area that is comprehensively regulated by the federal government. In *Colville*, by contrast, federal regulation of tribal commerce in cigarettes was inconsequential.[4] The federal interest, if any, in regulating cigarette sales to non-Indians on the reservation sales was miniscule. In the present case, the federal interest in regulating development and production of oil, gas and other minerals on tribal lands is indeed significant — so significant that Congress has committed the task to the Secretary of the Interior and he, in turn, has promulgated a sweeping set of regulations that governs virtually very aspect of the area. Whether the Court characterizes this case as a "preemption" case in the mold of *Warren Trading Post* and *White Mountain Apache, supra,* or as a "divestitute" case like *Oliphant, supra,* the result must be the same: where, as with oil and gas development of tribal lands, the federal government has taken the matter under its comprehensive control, the tribes, like the states, cannot interfere with the federal plan by imposing the burdens of taxation.[5] Regardless of the legality

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[4] Apparently the only federal regulation dealing with sales of tobacco on Indian lands is 25 CFR §251.17, which prohibits licensed traders from selling tobacco, cigars or cigarettes to Indians under 18 years of age.

[5] At least two lower federal courts have concluded that the Indian Mineral Leasing Act preempts state regulation of restricted Indian lands. **See Samedan Oil Corp. v. Cotton Petrol-**

of tribal taxation in other areas, the tribes cannot tax commerce regulated in its entirety by the United States.

This has been the consistent position of the Executive Branch since 1824. In that year, the United States Attorney General rendered the opinion that the Cherokee Nation had no right to impose a tax on federally licensed traders. 1 *Op. Att'y Gen.* 645, 652 (1824). The grounds upon which the Attorney General based his opinion, moreover, bear a distinct similarity to this Court's preemption rationale in *Warren Trading Post, supra.* After comparing the exclusive right of Congress to regulate commerce among the states with the exclusive right of Congress to regulate Indian commerce, the Attorney General stated:

> "The question is whether a right on the part of the Cherokee nation to tax the traders thus licensed on the part of the United States be compatible with that sole and exclusive right to regulate the trade from which the authority of the license proceeds? The imposition of the tax on the traders is the imposition of a new condition, on which alone the Cherokees say that this trade shall be carried

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[5] **Continued**

eum Corp., 466 F.Supp. 521 (W.D.Olka 1978) (holding that the Secretary's regulations preempted the application of Oklahoma's unitization orders on tribal lands, in the absence of Secretarial approval of the orders); Assiniboine & Sioux Tribes v. Calvert Exploration Co., 223 F.Supp. 909 (D. Mont 1963), rev'd on other grounds sub nom, Yoder v. Assiniboine & Sioux Tribes, 339 F.2d 360 (9th Cir. 1964) (holding that state-ordered pooling of Indians oil and gas lands was preempted by federal regulation). Likewise the Solicitor of the Interior Department has twice concluded that the Indian Mineral Leasing Act preempts state taxation of non-Indian mineral production on tribal lands. 84 I.D. 905 (1977); 86 I.D. 181 (1979). See also, B. T. Dolan, "State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations," 21 Rocky Mtn. Min. L. Inst. 475, 527 (1975).

> on. It is a new regulation of the trade instituted by them, while the sole and exclusive power to regulate it is acknowledged by the treaties to be in the Congress of the United States. Is this sole and exclusive power in Congress consistent with the existence of a like power in a separate and independent sovereign, directed by a different judgment and a different will? I apprehend not."

In 1934, the Assistant Secretary of the Interior Department rendered the following opinion on the same subject:

> "In view of the fact . . . that Congress has conferred upon the Commissioner of Indian Affairs exclusive jurisdiction to appoint traders on Indian reservations and to prescribe the terms and conditions governing their admission and operations (see secs. 261 and 262, title 25, U.S. Code), an Indian tribe is without power to levy a tax upon such licensed traders unless authorized by the Commissioner of Indian Affairs to do so."

Powers of Indian Tribes, 55 I.D. 14, 48 (1934). Fourteen years later the Solicitor of the Interior Department rendered an opinion on federal approval of tribal regulations. Again, the subject of the opinion was licensed trading, to which the Navajo tribal government attempted to attach conditions:

> "It follows . . . that the several conditions set forth in the [Navajo] resolution of March 20, 1948, in so far as they affect the business of licensed traders, cannot be made effective unless they are adopted by the Commissioner as part of the regulations prescribed by him in the exercise of his exclusive authority in this field, or unless they are incorporated, with the approval of the

> Secretary or his authorized representative, in permits covering the use by traders of lands belonging to the tribe. Standing alone, such conditions cannot be enforced either against new licensees or against those whose licenses have not been expired."

Regulation of Traders on the Navajo Reservation, 60 I.D. 176, 180 (1948). Based upon these authorities, the Department of Interior's *Handbook of Federal Indian Law* concludes:

> "Since . . . the exclusive power to trade with the Indians is vested in the Commissioner of Indian Affairs, it would seem that, in the absence of specific authorization, the tribe has no power to tax licensed traders."

Interior Department, Handbook of Federal Indian Law 886 (1958 official ed.) (footnotes omitted).

The federal government's regulation of licensed trading (now codified in part 251 of Title 25 of the Code of Federal Regulations) is no more pervasive or complete than its regulation of the leasing and production of oil, gas and other minerals from restricted Indian lands. Indeed, a comparison of the mineral leasing and production regulations (reviewed in Part IA of this brief) with the BIA's trading regulations demonstrates that the Secretary of Interior has regulated the former in far greater detail. Moreover, the overall economic and environmental consequences of mineral development regulation are exponentially greater than those of trading regulation. Unregulated and disparate development of the vast reserves underlying the reservations will pose

grave risks to the tribes, who benefit from the revenues of production, to the producers, who have invested millions of dollars in tribal leases, and to the public, which may ultimately pay for excessive financial burdens on production.

The federal interest entailed in uniform regulation of mineral development from tribal lands therefore mandates close scrutiny of any tribal taxing scheme that burdens development. As in *Warren Trading Post, White Mountain Apache,* and the Attorney General and Interior Department opinions quoted *supra,* there is no room in the federal regulatory scheme for the additional burdens of taxation imposed by a subordinate sovereign. A "particularized inquiry" into the nature of federal and tribal interests at stake reveals that the exercise of tribal taxing authority would violate federal law. *See White Mountain Apache Tribe v. Bracker, supra,* 100 S.Ct. at 2584.

3. *Federal versus tribal interests*

Tribal taxation would undermine the express purpose of the Indian Mineral Leasing Act "to obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." H. R. Rep. 1872, 75th Cong., 3d Sess. (March 3, 1938). If each tribe is left at large to tax any aspect of the business or property of producers, the effective burden upon producers will vary drastically from reservation to reservation, despite the existence of uniform federal regulation. The Secretary of the Interior's prescription of uniform terms of compensation in tribal leases and his ex-

clusive power to fix higher rates of royalty (*see* 25 CFR §171.13), are meaningless if the tribes are free to exact at will additional royalties in the form of taxes.

But an even more fundamental purpose of federal regulation under the Indian Mineral Leasing Act must be that of continuing the orderly development of tribal resources. Tribal taxation of such development, if it is unrestrained by federal authority, may well mean the end of oil, gas and mineral production on tribal lands. The power of tribes to tax producers is the power to drive producers from the reservations. This was precisely the point of the Attorney General of the United States when he opined that the Cherokee Nation lacked the power to tax licensed traders:

> "Again: if the Cherokee nation have the right to tax at all, the quantum of the tax rests in their own discretion. If they have a right to impose a tax of $50, they have the same right to impose a tax of $500, $5,000, or $50,000 . . . The treaties having given to Congress the right to create these regulations of trade, a power to destroy them is a wholly incompatible power; and a power to tax, as the Supreme Court has said, is, virtually, a power to destroy."

1 *Op. Att'y Gen., supra,* at 650.

4. *Federal delegation of regulatory authority*

Finally we address two comments to that portion of the decision of the Court of Appeals in these cases that would permit tribes organized under the Indian Reorganization Act to regulate—and therefore to tax—oil and gas production on restricted Indians lands. *See*

Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 548-49 (10th Cir. 1979).

First, Section 4 of the Indian Mineral Leasing Act charges Congress with the duty to regulate every aspect of all operations under any oil and gas lease issued pursuant to any act affecting restricted Indian lands. 25 U.S.C. §396d. Section 4 does not authorize the Secretary to delegate any portion of that responsibility to the tribes. The proviso in section 2 of the Act, which deals exclusively with the acquisition of leases, permits tribes organized under the Indian Reorganization Act "to lease lands for mining purposes," subject to the approval of the Secretary. If Congress had intended to permit the tribes to regulate operations under the leases, it would have inserted a proviso in Section 4 similar to the proviso in Section 2. Thus the structure of the Act makes it clear that organized tribes may undertake to lease their lands but that the responsibility for regulating operations under those leases remains with the Secretary. If Congress had intended to permit the tribes to exercise an open-ended power of taxation, it would have cast the Act in different terms. The limited power to lease, which is reserved to organized tribes, cannot rationally be interpreted as the power to ignore the terms of leases approved by the Secretary and to place the burden of taxation upon the lessees' entire operations.

Second, even if the powers of organized tribes to "lease lands for mining purposes" include the power to tax lessees, tribal power must be limited by the same due process considerations built into the Secretary's reg-

ulations. The Secretary's regulations provide that "no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease." 25 CFR §171.28. Implicit in this regulation is the recognition that the congressionally mandated leasing system is to be just that: a cooperative undertaking by the tribe, the private lessee and the United States, each to play its own role according to the covenants set forth in the leases. None of these parties — not even the federal administrator — may alter the basic terms of the arrangement once the lease has been appoved. If this were not the case, the development of Indian lands would not be accomplished by Congress's leasing system, but by the unfettered will of one or the other of the parties. If tribal regulations may in some sense supersede the Secretary's regulations, the tribes are nevertheless bound to observe the *consensual* nature of Congress's plan. In short, if the Secretary of the Interior cannot unilaterally change the basic terms of the lease after it is approved, neither can the tribe. Yet that is precisely the effect of the tribal taxing scheme now before the Court.

II. *TRIBAL TAXES IMPOSE AN UNLAWFUL BURDEN ON INTERSTATE COMMERCE*

The Constitution commits the power to regulate the free flow of interstate commerce to Congress exclusively. That power is forbidden to the states because "in the matter of interstate commerce we are a single nation —

one and the same people." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). This Court has never addressed the extent to which Indian tribes may tax interstate commerce originating on tribal lands. These amici, who are potentially subject to both tribal and state taxes, believe that tribal taxation provides a direct commercial advantage to the tribe and its members while imposing upon interstate commerce an unlawful multiple tax burden. Accordingly, the discussion that follows first examines the infirmities of tribal taxes standing alone, and then examines the problems arising from concurrent tibal and state taxation of the same activity or property.

A. *Tribal Taxes Unlawfully Provide A Direct Commercial Advantage to The Tribe and Its Members*

The strong national interest in insuring freedom of trade among the states and in avoiding economic Balkanization has been the basis of a series of recent decisions invalidating state legislation under the Commerce Clause. *See, e.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979). "[W]here simple economic protectionism is affected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey, supra*, 437 U.S. at 624. Parochial legislation discriminating against articles of commerce entering or leaving the state is unconstitutional. *Philadelphia v. New Jersey, supra, Hughes v. Oklahoma, supra.*

States may not advance local interests "by the illegitimate means of isolating the State from the national economy." *Philadelphia v. New Jersey, supra,* 437 U.S. at 627. The Court has carefully scrutinized such protective state taxes because it is a "fundamental principle" that "no State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318, 329 (1977).

Thus the states may not isolate themselves from the national economy in order to preserve local resources or to exact tribute from interstate customers for scarce goods. The basic question here is whether the Indian tribes may do so with respect to resources on reservations. This issue is of great significance to the tribes themselves. Thus, for example, the Navajo Tribal Council's "Energy Policy" resolves: "All energy resources of the Navajo Nation belong to the Navajo Nation. Navajo energy resources shall be developed to meet the present and future needs and for the full use and benefit of the Navajo people." Navajo Tribal Council Resolution CAP 34-80 (April 29, 1980). The Commerce Clause must be construed to impose upon the tribes limitations similar to those imposed on the states. Any other result would be "inconsistent with the overriding interests of the National Government," *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* 100 S.Ct. at 2081, and with the basic constitutional command that the United States be maintained as an open and free market.

The Court of Appeals in the case at bar correctly concluded that the standard to be used in applying the Commerce Clause to Indian tribes "is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade." *Merrion v. Jicarilla Apache Tribe, supra,* 617 F.2d at 545. However, the court erred in its conclusion that the Jicarilla tax did not discriminate against interstate commerce. Although the tribe's ordinance purports to be non-discriminatory, the tax is to be paid only with respect to oil and gas "sold or transported off the reservation." Oil and gas delivered to the tribe is specifically exempted. On its face the tax discriminates because it is imposed only on oil and gas transported from the reservation.

The Court of Appeals likened the tax in this case to the state severance taxes upheld in such cases as *Oliver Iron Mining Co. v. Lord,* 262 U.S. 1972 (1923), and *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Those cases, however, were significantly different. In the first place, the taxes involved in those cases made no overt discrimination of the kind involved here. The taxes in those cases were paid with respect to resources consumed within the state, as well as without. In the second place, the danger of discrimination against commerce in favor of local interests is far stronger where the tax is imposed by a tribe which is both the governing body and also the proprietor of the lands from which the taxed resources are taken.

When a state imposes a severance tax, the basic requirement that the tax apply to all production and not

just to that moving in interstate commerce substantially protects the national interest in freedom of trade. The local political process can be relied upon to prevent the imposition of taxes so high as to preserve resources exclusively for local use or unfairly to burden the interstate market. For a variety of local interests are adversely affected by such a tax. Producers find their competitive position in the interstate market impaired. Local costs of energy refined or processed in interstate commerce increase for both industrial and residential consumers. Those adversely affected in these ways may participate in the political processes through which taxing decisions are made.

On an Indian reservation, however, the political process cannot be relied upon to protect the national interest. Non-members of the tribe, though resident and doing business on the reservation, are barred from participation in tribal politics. Tribal members who can participate do not have private economic interests in the production of oil and gas nor will their energy costs be affected by the imposition of a tribal severance tax. A tribal severance tax naturally increases the resources available for tribal members without placing any direct or indirect burden on those members. The only restraints likely to be felt by tribal governments in determining the level at which to set the tax are economic—what the traffic will bear. In fact, a tribe seeking to repudiate its oil and gas leases and take over the property and production rights of the lessees may accomplish that end by imposing taxes so high as to make operation so unprofitable that lessees will abandon their leases.

In short, where tribal lands are held in common and where tribal members, who alone can vote, benefit from increased tribal revenues derived from the tax on oil and gas transported from the reservation, no effective political constraint on the taxing process exists. The Jicarilla Apache tax has the same economic effect as a state tax imposed exclusively on goods produced locally and shipped in interstate commerce: local government receives increased revenues and consumers outside the government's jurisdiction pay the price. Just as such a state tax would be held violative of the Commerce Clause, so must the tribal tax involved here.

In *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2277 (1980), this Court held that the Commerce Clause does not prohibit a state, in the absence of congressional action, from "participating in the market and exercising the right to favor its own citizens over others." Neither *Reeves* nor other cases like it, however, supports tribal taxation of businesses to which the tribe has leased its mineral lands. The Jicarilla Apache Tribe does not purport to exercise its proprietary interests in imposing the severance tax at issue here. The tribe does not itself sever or market oil and gas in the way that the state produced and marketed cement in *Reeves*. Instead the tribe exercises a claimed *governmental* power to tax private persons engaged in business within the reservation. The tribe exercised its proprietary power when it entered into oil and gas leases with petitioners, and the tribe is compensated for its property interests by petitioners' payment of bonuses and the royalty prescribed in the leases. This distinction between proprietary and

governmental basis for taxation is more than academic. If the Jicarilla Apache tax is to be regarded simply as a condition imposed upon those purchasing natural resources from the tribe, then it cannot apply to the parties in this case since that condition was not part of the agreement made when the leases were executed.

The fact that Congress has power to intervene and protect interstate commerce against burdensome tribal taxes should not be a reason for upholding the tax. It has long been settled that the power of Congress to intervene is not a reason for the Court to abandon the process of making "the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual states in exercising their taxing powers" *Boston Stock Exchange v. State Tax Commission, supra,* 429 U.S. at 329. Similarly, the power of Congress should not be a reason for avoiding the making of that "delicate adjustment" when tribal taxes are involved. The national interests in freedom of trade and in preventing tribal governments from isolating reservations from the national economy justify the Court's intervention now.

B. *Concurrent Imposition of State and Tribal Taxes Violates the Commerce Clause*

The Court of Appeals in the instant case, we insist, was clearly wrong when it stated: "That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of interstate commerce. . . ." 617 F.2d at 546. Petitioners have demonstrated that New Mexico imposes a

severance tax on the same oil and gas production which the Jicarilla Apache seeks to tax. Concurrent state and tribal taxes on interstate transactions create the same barriers to interstate trade created by multiplication of state taxes. It was "the object of the Commerce Clause" to remove such barriers. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938).

Because tribal taxation of the kind at issue in this case is a recent development, the courts have not considered the multiple tax question raised by petitioners. However, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), presents a useful analogy. The question there was whether Los Angeles County could impose its property tax on cargo containers present in the county on tax day but owned by Japanese shipping companies and used in foreign commerce. Even though the tax was fairly apportioned to values in California, the Court held the tax invalid because Japan had imposed its property tax on the same containers. The Court said: "It is a commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause." 441 U.S. at 446. A principal reason given for the *Japan Line* decision was that the Court was powerless to prevent multiple taxation by compelling Japan to apportion its tax.

The problem here is basically similar. Oil and gas produced on the reservation and sold off the reservation in interstate commerce must bear the burden of two severance taxes, while oil and gas produced elsewhere is subject to a single severance tax. As in *Japan Line*,

conventional Commerce Clause analysis does not readily serve to protect this commerce against multiple burdens. Where states alone are involved, only the state in which production occurs may impose a severance tax, a circumstance that prevents the multiplication of such taxes as a burden on interstate commerce. But if Indian tribal governments are held to have the power to impose severance taxes, two independent taxing jurisdictions within the geographical boundaries of a single state may tax production of the same oil and gas.

Moreover, *Washington v. Confederated Tribes of Colville Indian Reservation, supra,* does not validate dual tribal and state taxation of the kind involved here. In *Colville,* both the tribe and the state imposed excise taxes on local sales of cigarettes. Because the cigarettes were purchased by the buyer on the reservation and delivery was taken there, the Court in *Colville* had no occasion to consider the effects of dual taxation on interstate commerce. Commerce with the Indian tribes was affected only insofar as dual taxation would cause fewer persons to enter the reservation to purchase cigarettes. In this respect, the Court emphasized that the local demand for cigarettes arose only because the tribes sought to market a claimed tribal exemption from state taxes to non-Indians residing outside the reservation. It was not shown that the duplication of taxes would significantly affect that commerce upon the reservation which would exist but for the supposed state tax exemption.

The instant case presents dramatically different facts. Most of the oil and gas that petitioners produce

from the Jicarilla Apache Reservation is sold in interstate commerce and is sold, moreover, with no state tax exemption. Indeed New Mexico, like other states, has taxed hydrocarbon production from Indian reservations for many years. The addition of tribal taxes imposes an unconstitutional burden on the commerce in which petitioners, and others like them, are engaged.

CONCLUSION

For the foregoing reasons, these amici respectfully urge the Court to reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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November 17, 1980

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MICHAEL RODAK, JR., C

IN THE

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Respondents.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

I. Does the authority of an Indian Tribe to tax non-members, when on Indian land within a reservation, derive solely from the tribal power to exclude those non-members from that land, and the concommitant power to establish conditions for their entry upon such land?

II. If the answer to Question I is in the affirmative, may an Indian Tribe exercise that power to exclude a non-member from Indian land within a res-

ervation for failure to pay a tribal tax, under the following circumstances:

(1) The non-member has entered upon the Indian land and undertaken commercial activities there pursuant to a lease agreement with the Tribe which has been authorized by a federal statute and approved by the Secretary of Interior in accordance with that statute;

(2) The lease agreement does not include payment of the Tribal tax as a condition of remaining in possession and continuing the commercial activities authorized by the lease agreement; and

(3) The non-member is in full compliance with all terms and conditions of the lease agreement?[1]

[1]The Petitioners present in their brief six questions for review. Our questions I and II rephrase Petitioners' Questions 1 through 3 and that portion of their Question 4 relating to preemption of tribal taxing power by the total federal regulatory scheme. We do not here discuss that portion of Question 4 relating to the effect of 25 U.S.C. § 398c; nor do we discuss Questions 5 and 6.

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INTEREST OF THE STATE OF WASHINGTON

The interest of the State of Washington is set forth at length in the Brief of State of Washington as Amicus Curiae in Support of Petition for Writ of Certiorari, pp 2-5. We would respectfully refer the Court to our discussion there, rather than repeat it here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our starting point, of course, must be this Court's decision, on June 10 of this year, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, ... U.S. ....., 48 LW 4668. This decision reaffirmed the tribal "authority to tax the activities or property of non-Indians taking place or situated on Indian lands * * *" 48 LW at 4673.

But what is the source of this authority? Is it found in the power of Indian Tribes to exclude non-members from Indian lands, and the concomitant power to set conditions for their entry upon those lands? Or, on the other hand, is the source found in some sort of general governmental power over all persons within the territorial boundaries of the reservation, be they members or not?

The difference, we believe, is critical here. If taxing authority over non-members finds its source in the tribal power to condition entry upon Indian lands, then one must ask a further question. May the Tribe exercise that power when, as here (1) the non-member is undertaking commercial activities on those

lands pursuant to a lease agreement with the Tribe that has been authorized by a federal statute, and approved by the Secretary of Interior in accordance with that statute; and (2) that non-member lessee is in full compliance with all of the terms and conditions in the lease agreement, but those terms and conditions do not include any requirement to pay the tribal tax?

Does the statute authorizing the lease agreement, in short, contemplate a real lease, which allows the lessee to remain in possession so long as he complies with the terms and conditions of the lease? Or, on the other hand, does the statute envision a sham lease, allowing the tribal landowner to dispossess its lessee even though he be in complete compliance with the lease agreement?

This problem does not arise, at least in so acute a form, if the tribal authority to tax non-Indians finds its source instead in some sort of general governmental power over all persons within the reservation. A simple example may help illustrate our point.

A State, of course, is itself a landowner, as is the Jicarilla Apache Tribe here. Those state lands may contain oil and gas, as do the tribal lands here. Accordingly, the State may enter into leases with private operators, under which those operators have the right to extract the oil and gas in return for royalty payments to the State, as stipulated in the lease agreement.

If the state legislature imposed a new tax upon that operator, such as a severance tax, or increased the rate of an already existing tax, that operator would have no grounds for complaint in the judicial forum, though he might well have in the political. The taxing power of the legislature applies to him just as much as to anyone else within the State's jurisdiction. And the source of the legislature's power to impose this tax is the same as its power to pass any other law—its general governmental power as the legislative body of a sovereign state.

In enforcing this tax, the State may use any and all of the usual mechanisms it employs for any other tax; e.g., subjection of the taxpayer to its courts, seizure of the taxpayer's property for nonpayment, criminal or civil fines, and perhaps even incarceration. Further, like the power to impose the tax in the first place, the power to employ these sanctions is in no way dependent upon the State's status as an owner-lessor. (Our hypothetical severance tax would, we presume, be imposed upon all extractors of oil and gas, whether operating on leased lands, public or private, or on lands which they own themselves.)

The tribal authority to tax non-members is not, we contend, like the State's power to tax in our example. It is not based upon any sort of general governmental authority over all persons within a territorial jurisdiction, as is the power of the State.

To show why this is so, we examine this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191

(1978), and demonstrate that the reasoning of this opinion is just as applicable on the civil side as it is on the criminal side of any assertion of general governmental power over non-members.

We also examine the legislative history of the Indian Reorganization Act of 1934, 48 Stat. 984, to show that Congress has likewise deliberately rejected a policy of vesting general governmental powers, civil or criminal, over non-members.

In certain narrow, specific areas, Congress has admittedly granted to Indian Tribes a type of jurisdiction over non-members. See 18 USC 1165, relating to unauthorized hunting and fishing on Indian lands; 18 USC 1161, relating to control of intoxicants on Indian reservations; and 42 USC 7474, relating to determination of air quality standards for reservation lands. Far from reflecting any congressional assumption of any general criminal or civil jurisdiction reservation-wide over non-members, these statutes reflect exactly the opposite assumption. And we show that, at least until recent years, the executive branch has shared that assumption along with the Congress.

Nor does *Colville* require a different conclusion. As already observed, the Court there reaffirmed the authority of a Tribe to tax non-Indians. That authority, however, was expressly confined to transactions or property situated on Indian lands. More importantly, the judicial and administrative decisions cited by the Court in support of that taxing power

involved situations in which the only enforcement sanction invoked was expulsion of a non-member's person or property from those Indian lands. The taxation power, in short, found its source in the tribal power to exclude, and not in a general governmental power over non-members.

But may that power to exclude be invoked in this case? We show that it may not, by reason of the statutory provisions under which the leases involved here were executed, and approved by the Secretary of Interior. Act of Mar. 3, 1927, 44 Stat. 1347, 25 USC 398a-398e. That act contemplates *real* leases, granting the lessee the right to remain in possession and conduct the activities authorized by the lease agreement so long as he complies with its terms. Congress, in short, did not envision leases which a Tribe could unilaterally turn into a sham.

ARGUMENT

I. THE ISSUE OF TRIBAL GOVERNMENTAL POWERS OVER NON-MEMBERS[2]

A. Under Oliphant v. Suquamish Tribe, the Only Available Sanction Against a Non-Member for Violation of a Tribal Law or Regulation is Expulsion.

Before examining the principles established by the Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, we should note what *Oliphant* did *not* decide. It did not decide that the Suquamish Tribe

[2]Our discussion in Part I of this argument follows closely and somewhat expands upon our discussion at pp. 18-24, and 27-29 of our amicus brief on the merits in Montana v United States, No. 79-1128. We view the two cases as very closely connected on certain critical issues.

could not prohibit Mr. Oliphant and Mr. Belgarde, the alleged offenders, from ever again coming onto Indian lands within the Port Madison Reservation, and forcibly eject them should they do so.[3] *Oliphant*, in short, was not an expulsion case. Rather, *Oliphant* was a case in which the tribe claimed the power to impose on a non-member the full range of criminal sanctions, for violation of its laws, that it could admittedly impose on its members.

Does the reasoning by which this result was reached apply on the civil, as well as the criminal, side of a tribal assertion of general governmental power against a non-member? We here show that it does.

The structure of the opinion should here be noted. The first part examines the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts that tribal courts do not have the power to try non-Indians. 435 U.S. 196-206. That presumption, however, is "not conclusive on the issue before us," but is entitled to "considerable weight". 435 US at 206. Neither is the second part, which reviews the relevant treaty provisions, conclusive either. 435 US at 208. The conclusive part is the third, which begins:

> "But an examination of our earlier precedents satisfies us that, *even ignoring treaty provisions and congressional policy*, Indians do not have criminal jurisdiction over non-Indians absent

[3]Of course, the Indian Civil Rights Act, 25 U.S.C. § 1302, might well require that basic due process, such as an opportunity for a hearing, be afforded before any such expulsion is effective.

affirmative delegation of such power by Congress." (Emphasis supplied) 435 at US 208.

The third part *is* conclusive, independently of the first two. Significantly, none of the precedents examined in this third part directly involved the question of tribal jurisdiction over non-Indians, either civil or criminal. They did involve, however, the status of Indian tribes.

That status is one of subordination to and dependency upon the United States; it affects no only the relationship of the Indian Tribes with the United States Government as such, but the relationship of the Tribes with the non-Indian United States citizen as well.

> "* * * Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' *Johnson v. M'Intosh*, 8 Wheat 543, 574, 5 L.Ed. 681 (1823)." *Oliphant* 435 U.S. at 209.

And this diminishment of tribal sovereignty resulted in the loss of the tribal power to govern anyone but the Indians themselves.

> "In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows:
>
> [T]he restrictions upon the right of soil

> in the Indians amount * * * to an exclusion of all competitors (to the United States) from their markets; and the limitation upon their sovereignty amounts to the right of *governing every person within their limits except themselves.*

Fletcher v. Peck, 6 Cranch 87, 147." (Emphasis in original.) *Oliphant*, 435 U.S. at 209.

Obviously, what Mr. Justice Johnson was talking about in *Fletcher v. Peck* was the power of *governing*, whether the forms of governing be characterized as civil or criminal.

The opinion continues:

> "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. * * *"

Oliphant, 435 U.S. at 209, 210.

Simply because an assertion of governmental power is "civil" rather than "criminal" does not mean that the hazards to a United States citizen, and the risk to his personal liberties, are any less.

To illustrate: Perhaps the most pervasive and fundamental assertion of governmental power, on the civil side, is the taxing power, the same type of power

as is claimed by the Tribe here. The federal government, states, and local governments collect these taxes through voluntary compliance in most cases, but through compulsory enforcement mechanisms when necessary. Those enforcement mechanisms or sanctions include subjection of the taxpayer to the government's courts, forcible seizure of the taxpayer's property, and punishment of the taxpayer for non-compliance. That punishment might be through criminal proceedings; but it might be through civil fines as well; and civil proceedings might involve incarceration, for civil contempt.

It makes little difference to the taxpayer that he has lost his property or liberty through "civil" rather thn "criminal" proceedings.

Nor did the holding in *Oliphant* rest upon such a distinction, as the discussion of *Ex Parte Crow Dog*, 109 U.S. 556, clearly shows. The United States was there attempting to extend federal criminal law:

> "* * * by argument and inference only, * * * over aliens and strangers; over the members of a community separated by race [and] tradition, * * * from the authority and power which seeks to impose upon them the restraints of an external and unknown code * * *; which judges them by a standard made by others and not for them. * * * It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by * * * a different race, according to the law of a social state of which they have an imperfect conception. * * *" 109 U.S. at 571. Quoted at 435 U.S. at 210, 211.

After this quotation, the Court in *Oliphant* continued:

> "These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs."

Oliphant, 435 U.S. 210, 211.

The rationale of *Crow Dog*, as applied in *Oliphant*, logically applies to *all* tribal law. Whether that law be criminal or civil, it is equally "external and unknown" to non-Indians.

Historically, the Indian tribes have argued that they have the status of separate nations, with their own inherent governmental power over their own members. As shown by such cases as *Talton v. Mayes*, 163 U.S. 376, *United States v. Wheeler* and *Crow Dog* itself, that argument has uniformly met with success. But, under *Oliphant* it is *precisely because of this separateness* that this power of Indian tribes must be confined to tribal members, and not be extended to non-Indians.

Two last points: as already suggested, *Oliphant* in no way affects a Tribe's treaty right to exclude or expel non-Indians. It does, however, prohibit an assertion of general governmental power, be that assertion categorized as "criminal" or "civil", in which the other usual sanctions or enforcement mechanisms are sought to be utilized by the Tribe.

Secondly, *Oliphant* in no way affects the power of Congress to delegate to Indian Tribes governmental

power over non-Indians. But Congress, in fact, has refused to do so, except in very narrow circumstances, as we shall next see.

B. In Adopting the Indian Reorganization Act of 1934, Congress Deliberately Denied to Indian Tribes Any General Governmental Power Over Non-Members.

The Indian Reorganization Act, as originally introduced in Congress, was a very different bill from that which eventually passed. (Act of June 18, 1934, 48 Stat. 984.) Those differences are of great significance here. The original version was introduced in the House as H.R. 7902, 73rd Cong., 2nd Sess. (1934) and in the Senate as S. 2755, 73rd Cong., 2nd Sess. (1934).

The heart of the bill was Title I, "Indian Self-Government." Section 2 of Title I read, in pertinent part, as follows:

> "In accordance with the foregoing purposes, the Secretary of the Interior is hereby authorized to *issue* to the Indians residing upon any Indian reservation or reservations or subdivision thereof *a charter granting to the said community group any and all such powers of government * * * as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned * * **" (Emphasis supplied)

Section 4 spelled out in more detail the powers which were to be included in the charter. The first is found in subsection (a):

> "(a) To organize and act as a *Federal municipal corporation*, to establish a form of government,

> to adopt and thereafter to amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, *and any other functions customarily exercised by local governments.*" (Emphasis supplied)

Subsection (d) granted another important power:

> "(d) To establish courts *for the enforcement and administration of ordinances of the community*, which courts shall have *exclusive jurisdiction over all offenses of, and controversies between, members of the chartered community, under the ordinances of such community, and jurisdiction exclusive or non-exclusive over all other cases arising under the ordinances of the community*, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months: * * *." (Emphasis supplied)

Title IV of the bill also dealt with courts, establishing a Court of Indian Affairs. Section 3 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction "of all cases, civil or criminal, arising under the laws and ordinances of a chartered Indian community, wherein a real party in interest is not a member of such community." (Subsection 4)

Clearly, a chartered Indian community was to have broad legislative jurisdiction over non-members—as broad as those of any municipal corporation or other unit of local government. And the tribal

courts and the Court of Indian Affairs would have jurisdiction over non-members as well.

Title I and Title IV did not survive. And a major reason was that the chairman of the Senate Committee on Indian Affairs, Senator Wheeler from Montana, was adamantly opposed.

In the hearing on S. 2755, the following exchange took place concerning Title I:

> "The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
> "Commissioner Collier [of the Bureau of Indian Affairs]. Yes.
> "The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and, in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that it would lead to conflicts in the Northwest between the Indians and the whites.
> "I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there, your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there, which would be, in my judgment, a serious mistake on the part of the Indians to do it." Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755, 73rd Congress, 2nd Sess. (1934) p. 68 (hereinafter "1934 Hearings").

Senator Wheeler liked the proposed court system in Article IV no better. Under discussion was an amendment, proposed by the BIA, involving the criminal jurisdiction of the court:

> "Commissioner Collier. Mr. Chairman, this amendment would leave with the proposed new court of Indian affairs all prosecutions for crimes insofar as they are prosecutions under the laws affecting Indian country.
> The Chairman. Yes; but it is perfectly ridiculous to set up this separate court." 1934 Hearings, p. 205.

The discussion then turned to the jurisdiction of the court, in the case of a non-Indian trying to collect a debt from an Indian. And Senator Wheeler expressed his views about the proposed court once again.

> "The Chairman. If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment.
> "Senator O'Mahoney. Senator, I don't think you agree with this provision.
> "The Chairman. Well, I certainly do not agree with it, and I do not think the Indians if they understood it in the Northwest would want it, because of the fact that it would just simply hamper them and retard them rather than do them any good.
> "Commissioner Collier. Mr. Chairman, we have explained that we did not regard this section as an integral part of the bill, as indispensable at all.
> "The Chairman. Yes; I am glad of that." 1934 Hearings, p. 208.

What happened next is best explained in Senator Wheeler's own words:

> "The Chairman. * * * I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy, and yesterday they sent up this bill, which eliminates, it seems to me, practically all of the matters that are in controversy, * * *" 1934 Hearings, p. 237.

The bill which the BIA sent up was the bill which ultimately passed. (Compare S. 3645, reproduced at 1934 Hearings, p. 234, and Act of June 18, 1934, 48 Stat. 984). Thus the Congress, in 1934, denied to the Indians the broad, general governmental powers over Indians and non-Indians which the BIA had hoped to attain for the Indians. And that fact is reason enough for this court to deny the claim to any such powers now.

C. Congress Has Consistently Acted Upon the Assumption that Indian Tribes Do Not Have Inherent General Governmental Power over Non-Members.

Since 1934, Congress has delegated to Indian Tribes certain governmental powers over non-members. For example, in 1953, Congress removed the general prohibition of alcoholic beverages in Indian Country, and allowed Indian Tribes to regulate, with the approval of the Secretary of Interior, the introduction of alcoholic beverages into Indian Country, so long as state law was also complied with. Act of Aug. 15, 1953, 67 Stat. 586, 18 USC 1161. Under 18 U.S.C. 1154(c), Indian Country would include fee patent land, owned by non-Indians, so long as that land was within the exterior boundaries of a reser-

vation and was not within a "non-Indian community". See *United States v. Mazurie*, 419 U.S. 544, 547 (1975).

If an Indian Tribe has inherent general governmental power over non-members reservation-wide, there seems little need for Congress to have made that delegation to the Tribes in 1953.

Congress took a similar action in 1960. In the Act of July 12, 1960, 74 Stat. 469, 18 U.S.C. 1165, it prohibited the unauthorized entry upon Indian lands for the purpose of hunting or fishing. The reason for this congressional action was made explicit in S. Rep. No. 1686, 86th Cong, 2d Sess, 2-3 (1960):

> "* * * Indian tribal law is enforceable against Indians only; not against non-Indians.
> * * *
> "Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges."

Again, in the Clean Air Act Amendments of 1977, 91 Stat. 685. 735, it is provided that for purposes of designation of areas by class for air quality standards, "lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. 7474(c).

And again, in the Surface Mining and Reclamation Act of 1977, 91 Stat. 445, 523, the Secretary of Interior is directed to prepare:

> "[P]roposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforce-

ment of regulation of surface mining of coal on Indian lands." 30 U.S.C. 1300 (a).

The term "Indian lands" is defined to include all lands within the exterior boundaries of a reservation, whether in Indian ownership or not 30 U.S.C. 1291 (9).

The pattern of congressional action is clear. In specific areas, in which it determines, after sufficient study, that there is a tribal interest meriting federal protection, Congress will delegate to a Tribe a limited measure of governmental power over non-members. As shown by our first, third, and fourth examples,[3] this power may extend to non-members on non-Indian lands. But implicit in this pattern is the assumption by Congress that its action is required in order that a Tribe may have these powers at all.

This same assumption, moreover, has been followed by Congress in the area directly involved here, taxation. In 25 U.S.C. 319, the Secretary of Interior is authorized to grant easements for telephone and telegraph lines across Indian reservations. In 25 U.S.C. 321, like authority is granted for oil and gas pipelines. In both statutes, the Secretary is also authorized to impose a tax upon these facilities "for the use and benefit of the Indians." The conferral of this authority upon the Secretary would make little sense, and would constitute an essentially useless act, if the Tribes themselves had the inherent authority to impose these same taxes upon these same facilities.

[3]So far as we can ascertain, our fourth example is still in the study stage, and has not yet been implemented by Congress.

D. The Understanding of the Executive Branch Has Been That Indian Tribes Possess No Inherent General Governmental Power over Non-Members.

In 1934, shortly after passage of the Indian Reorganization Act (see pp. 11-15, supra), the Solicitor of the Department of Interior, Mr. Margold, was squarely faced with the question of the extent of an Indian Tribe's inherent sovereign power over non-members. The specific question was the extent of a Tribe's inherent power of eminent domain. Op. Sol. I.D. Ind. Aff. 1917-1974, Vol. I, 484, 489-491 (Dec. 13, 1934).[4]

The opinion first considered the source of this tribal power.

> The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in *Cincinnati v. Louisville and Nash R.R. Co.* (223 U.S. 390, 404), "one of the powers vital to the public welfare of every self-governing community."
>
> No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on "Powers of Indian Tribes" (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard [Indian Recognition] Act at 489.

Yet Solicitor Margold concluded:

> I am of the opinion that the Indian Service is correct "in assuming that a tribe organized un-

[4]This important opinion remained unpublished until this recent two volume compilation.

> der section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by non-members." *Ibid.*

This inherent power of eminent domain, which is "one of the usual powers of sovereignty", may be exercised only with respect to tribal members.

From this, Solicitor Margold draws another important conclusion.

> It is proper to add that since the tribal power of condemnation is based, in the first instance, upon tribal jurisdiction over the members of the tribe, it ceases to exist where an Indian abandons his tribal membership; and as was said in the opinion of this Department on "Powers of Indian Tribes," (M-27781, approved October 25, 1934, at page 36), "any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses." * * *
>
> Threatened oppression in the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens.
>
> The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law. At 490.

Non-Indians are in the same status as the Indian who has severed his tribal membership, as the opinion goes on to make clear.

> Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the lands of non-Indians. An Indian

> tribe will have whatever rights of condemnation the laws of the State may give to it.
>
> * * *
>
> Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts. At 490, 491.

As this opinion explicitly recognizes, a tribal claim of general governmental power, even if it be on the civil side, and whether it involves condemnation, taxation, or any other form of civil jurisdiction, is valid only with respect to tribal members. And as the opinion reminds us, our system of government has no room for "threatened oppression in the form of condemnation, taxation, or other incidents of social control" over those non-members.

E. Washington v. Confederated Tribes of the Colville Indian Reservation, ___ U.S. ___, 48 LW 4668 (June 10, 1980) Supports the Conclusion That The Authority of a Tribe to Tax Non-Members is Derived from the Power to Exclude Non-Members From Indian Lands, and not from any General Governmental Power over Those Non-Members.

We now arrive at *Colville* itself. The Court there stated:

> "The power to tax transactions occurring *on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status. Cf. *United States v. Wheeler*, 435 U.S. 313 (1978)" (Emphasis

supplied; 48 LW 4763.)
And again:

> "*Authority to tax the activities or property of non-Indians taking place or situated on Indian lands*, in cases where the tribe has a significant interest in the subject matter, was very probably one of the tribal powers under "existing law" confirmed by § 16 of the Indian Reorganization Act of 1934. 48 Stat. 987, 25 U.S.C. § 476." (Emphasis supplied; *Ibid*)

The reference to "trust lands" and "Indian lands" suggests that the taxing power over non-members is derived from the tribal power to exclude them from those lands. But the reference to *Wheeler* seems to suggest otherwise.[5]

The problem is easily resolved, we suggest, by examining the authorities cited by the Court in its discussion of the tribal taxing power. Thus, it cited Powers of Indian Tribes, 55 ID 14, 46 (1934), as follows:

> " 'Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.' " Ibid. (Emphasis added). 48 LW 4673.

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[5]The validity of the tribal "tax" in *Colville*, we suggest, was actually not dependent at all upon the fact that the purchase of the cigarettes took place on Indian land. As we pointed out in the State's reply brief in *Colville*, p. 17, the only enforcement mechanism utilized was for the smoke-shop operator to refuse to sell cigarettes to any non-Indian customer who refused to pay the tax. And for this reason, the tax could just as easily be imposed and enforced *off* Indian lands as on them. For this same reason, we suggested that the case did not involve a true tribal "tax" at all, and that the validity of the tax was really not an important issue.

The author of this opinion, dated Oct. 25, 1934, was Interior Solicitor Margold, who, we have just seen, stated approximately two months later, on Dec. 13, 1934, that inherent tribal sovereignty did not include the power to condemn—or tax—the property of non-members. Solicitor Margold must then be basing the tribal taxing power over non-members upon the power to exclude from Indian lands, and to condition entry. And the reference to "privileges of trade, residence, etc., to which taxes may be attached as conditions" compels that conclusion.

The other authorities cited by the Court in *Colville* support that same conclusion as to the source of tribal taxing power over non-members. Thus, in 17 Op. Atty. Gen. 134 (1881), "Intruders on Lands of the Choctaws and Chickasaws," the question was whether non-Indians who were on lands of these Indians without complying with their permit laws could be forceibly removed therefrom by the Department of Interior. The answer, of course, was that they could.

In 7 Op. Atty. Gen. 174 (1855), one of the questions was whether an Indian court had civil jurisdiction over a white man who had *voluntarily made himself a member of the Chickasow Nation, and was exercising all the rights of a Chickasaw.* Again, the answer was yes.

In 23 Op. Atty. Gen. 214 (1900), "Trespassers on Indian Lands," the question again was whether a non-member could be forcibly removed by the United States for failure to pay a tribal permit or licensee

fee on the non-member's business. Again, the answer was yes.

Similarly, the three decisions cited in *Colville*, *i.e.*, *Buster v. Wright*, 135 F. 947 (CA 8 1905), appeal dismissed. 203 U.S. 599 (1906); *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8 1956); and *Morris v. Hitchcock*, 194 U.S. 384 (1904), were all removal cases.

One last observation on this point. Although the tribal power to exclude non-members from Indian lands, and to attach conditions upon entry, is similar to that of an ordinary landowner, there is an important difference. The Tribe can exercise that power, not only with respect to lands in tribal ownership, but also with respect to lands owned by its members.[6] By reason of this difference, that power can fairly be characterized as a power of "sovereignty"; and in his Oct. 25, 1934 opinion, quoted above, Mr. Margold so characterized it. But as he himself made clear two months later, this should not be confused with the "sovereignty" which a state or the federal government exercises when it imposes a tax. That sort of sovereignty, when exercised by a Tribe, is applicable only to tribal members.

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[6]As shown by *Morris v. Hitchcock*, supra, which involved the application of the Curtis Act, Act of June 28, 1898, 30 Stat. 495, the power to condition entry may even apply to non-Indians when on their own lands, if there is a federal statute which recognizes such a power.

II. THE ISSUE OF THE TRIBE'S POWER TO EXCLUDE AND CONDITION ENTRY UNDER THE CIRCUMSTANCES IN THIS CASE.

On this issue, there may actually be no controversy with the Tribe. For the Tribe appears to agree that the Petitioners have valid leases, and that accordingly the Tribe has no power to remove or exclude them.[7] The Petitioners' leases, in short, are real leases and not sham leases.

Nevertheless, a brief discussion may be in order, in anticipation of a possible change in the position of the Tribe on this point.

We start with the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. 398a-398e. That Act, which authorizes the leasing of lands on executive order reservations for oil and gas production, was designed to resolve the confusion and uncertainty then existing on two critical questions:

Who held the beneficial interest in the oil and gas on these reservations? Was it the United States? Or the Tribe? Further, what statutory authority, if any, existed for the leasing of these lands for oil and gas production?

Senator Bratton of New Mexico explained how these problems arose.

Mr. President, I think the question now before

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[7]See Brief in Opposition of Respondent Jicarilla Apache Tribe, 18, in which the Tribe discusses *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (CA 8, 1956), and concludes:

"*As in the present case*, the non-Indian lessee was already on the reservation pursuant to an authorized lease. Thus, the power to exclude could not have been the basis for the Court's approval of the tax because *the Tribe could not exclude or remove the holder of a valid lease.*" (Emphasis supplied)

the Senate is of sufficient importance and magnitude to justify consuming some time in placing before the Senate just what we are about to do.

Prior to 1871 the method of establishing reservations for the occupancy of Indians was through treaties entered into between the United States and the Indian tribes. Reservations were created and established in that manner. In 1871 the procedure was changed and the method of creating reservations by treaty was discontinued. The new method was adopted which was to create such reservations by Executive orders entered by the President from time to time. Under that method various reservations were created. At the present time they are located in 10 different States, and the area aggregates about 23,000,000 acres of land. It is that land with which we are dealing in this bill.

Prior to 1920 we had what was commonly called the placer filing law, under which locators could take up and acquire the right to explore land after discovery of minerals, by staking the land, recording the notice of filing in the office of the county clerk, and otherwise complying with the law then in force.

In 1920 that law was repealed, and there was enacted what is commonly called the general leasing act, approved February 25 of that year, which authorized the Secretary of the Interior to execute leases for oil and gas purposes upon lands constituting the public domain belonging to the United States. In due time the question arose as to whether that law applied to executive-order Indian reservations, and of course that question turned upon where the title to those lands was vested; that is, whether the title remained in the United States or whether it was vested in the Indians. The question was submitted to [Interior] Secretary Fall, and in 1922 he rendered an exhaustive opinion holding that,

those lands were owned by the United States, subject to the right of occupancy of the Indians, and that consequently the general leasing act applied.

Following that decision a number of applications were filed, covering lands located within those reservations. The number of such applications which are now pending before the department has been variously stated from two hundred and odd to 475. About 20 of those received favorable action by the Secretary of the Interior, and permits were issued in accordance with the provisions of the general leasing act. Those lands are embraced within the Navajo Reservation, which consists of about 10,000,000 acres of land, located in the States of Utah, Arizona, and New Mexico, and perhaps some in Colorado. The question was debated and continued to be one of controversy until in 1924, when Attorney General Stone rendered an opinion in which he held that the general leasing act did not apply. His opinion will be discussed later. He reached that conclusion from two or three considerations.

Of course, at that time the applications were suspended. The Interior Department, harmonizing with the opinion of the Attorney General, declined to grant any additional permits. The 475 applications, or whatever the number may be, remained and still remain on file in the Interior Department. 67 Cong. Rec. 10913, 10914, June 8, 1926.

Senator Bratton further explained that, in accordance with the position taken in the Attorney General's opinion, the United States brought an action in Federal court in Utah to have the twenty or so leases previously issued declared void and cancelled. The Federal court, however, disagreed with

the Attorney General, held that the 1920 Act applied, and refused to cancel the leases.

The United States appealed, the Court of Appeals certified the question to this Court, where it apparently remained pending. 67 Cong. Rec. 10914.

As again stated by Senator Bratton:

> Therefore we are in this position: If the Federal court of Utah was correct and the general leasing act of 1920 does apply to these lands, the Indians own no interest in the oil and gas or other minerals, but merely possess the right of occupancy. If that decision is affirmed the royalty or the income from the development of those lands for oil and gas purposes will be divided in accordance with the provision of the general leasing act, which is 52.5 per cent to the reclamation fund, 10 per cent to the General Treasury, and 37.5 per cent to the State in which the land is located.
>
> * * *
>
> If we fail to enact legislation and the Supreme Court of the United States should agree with the Federal court of Utah that title to such lands is vested in the United States, the Indians would have no interest in any part of the royalty therefrom; so that it is important that we enact legislation of some kind upon this subject. *Ibid.*

The oil companies had no less a problem. If the opinion of the Attorney General was correct, and the Federal court in Utah incorrect, there would have apparently been no statutes authorizing any leasing at all of the lands on executive order reservations. The twenty or so leases previously issued would remain invalid, and no future leasing would occur.

The 1927 Act solved these problems. In section 1,

it provided that unallotted lands within the limits of any executive order reservation "may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (43 Stat. 244)". 25 U.S.C. 398a. The Act of May 29, 1924, codified as 25 U.S.C. 398, provides a general leasing authority for other Indian reservations.[8]

Section 2 of the Act (25 U.S.C. 398b) set aside in the Treasury of the United States, for the benefit of the Tribe, the moneys derived from the lease rentals, royalties, or bonuses.

Section 3 of the Act (25 U.S.C. 398c) provided that state or local authorities could levy taxes upon the "improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee" operating on the reservation, in the same manner as it might tax any other oil and gas operator. Further, "such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties."

Thus sections 2 and 3 assured both the Tribes and the states of a share of the benefits.

Lastly, section 5 provided relief for the operators who had been granted leases under the 1920 Act, but had seen their leases invalidated by the Attorney General's opinion. (See 34 Op. Att. Gen. 171 (1924)) Any such lessee who had spent money in developing the leased land, or had started drilling before Janu-

[8]Whether the 1924 Act applied to executive order reservations was a matter of debate. See colloquy between Senators Bratton and Wheeler on this point. 67 Cong. Rec. 10914.

ary 1, 1926 would be entitled to a lease of one-fourth the land covered in his original application.

It should be patently obvious that, in passing the 1927 Act, Congress intended to authorize the issuance of *real* leases, i.e., leases which entitled the lessee to remain in possession and continue his operations so long as he complies with the terms and conditions of the lease. The oil and gas industry ws assured of a statutory system whereby the resources on executive order reservations would be available for development. The Tribes and the States were assured of their share of the proceeds from that development. And even those lessees who had expended money on a false start were given relief. Fairness to these lessees was important to the Congress, and indeed was the major consideration in adopting section 5 of the Act.

It is simply inconceivable that Congress intended to allow a Tribe to disrupt completely this statutory system through the exercise of its power to remove non-members from the reservation.

The Tribe contends, we recognize, that the Petitioners' leases were issued pursuant to the Act of May 11, 1938, 52 Stat. 347, 25 U.S.C. 396a-396g, rather than pursuant to the 1927 Act. See Brief in Opposition of Respondent Jicarilla Apache Tribe, 11-15. Even if this contention is correct, however, this does not affect our basic submission. If the 1938 Act effectively replaced the 1927 Act, as the Tribe contends (see Brief in Opposition, supra, 12, 13) Congress

could hardly have intended to substitute for the 1927 Act, which provided for the issuance of real leases, a new statutory system which provided for the issuance of sham leases. The 1938 Act, even if applicable, arrested the tribal exercise of its power to exclude just as effectively as the 1927 Act.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals should be reversed.

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Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

October Term, 1980

J. GREGORY MERRION, ET AL.,

Petitioners,

JICARILLA APACHE TRIBE, ET AL.,

Respondents.

AMOCO PRODUCTION COMPANY, ET AL.,

Petitioners,

JICARILLA APACHE TRIBE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF WESTMORELAND RESOURCES, INC.

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Westmoreland Resources, Inc., moves the Court to leave to file a Brief Amicus Curiae in the form attached to this Motion for the following reasons:

1. Westmoreland Resources, Inc. mines coal in Montana under a lease from the Crow Tribe of Indians. It is subject to the Montana 30 percent coal severance tax and may be subjected to 25 percent coal severance tax which the Crow Tribe desires to impose on it. Because the imposition of both taxes would make its operations uneconomic, it has a very direct interest in whether or not (1) Indian tribes are held to have the power to tax non-Indians and (2) if they do, whether or not the combined effect of both a state and tribal severance tax violates the Commerce Clause.

2. On December 8, 1980, this Court decided that this case be set for oral argument in tandem with *Commonwealth Edison Company, et al. v. State of Montana, et al.* Nos. 80-581 which raises the question of whether or not the Montana Coal Severance Tax violates the Commerce Clause.

3. Because this joinder for argument suggests that the Court may be interested in seeking some solution to the conflicting interests of States, Indian tribes and mineral resource operators, Westmoreland Resources, Inc. desires that its views in this subject be considered by the Court.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE

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INTEREST OF WESTMORELAND RESOURCES, INC.

Westmoreland Resources, Inc. mines coal in Montana under a lease from the Crow Tribe of Indians. It is subject to the Montana 30 percent coal severance tax and may be subjected to a 25 percent coal severance tax which the Crow Tribe desires to impose on it. Because the imposition of both taxes would make its operations uneconomic, it has a very direct interest in whether or not (1) Indian tribes are held to have the power to tax non-Indians and (2) if they do, whether or not the combined effect of both a state and tribal severance tax violates the Commerce Clause.

Those issues are the subject of litigation instituted by the Crow Tribe against the State of Montana in the United States District Court for the District of Montana in which the Tribe claims the Montana tax is invalid because, among other things, the size of the tax interferes with its powers of self government. Westmoreland has intervened in that action claiming the Crow Tribal tax is invalid for many of the reasons advanced by Petitioners in this case *(Merrion, et al. v. Jicarilla Apache Tribe, et al* (Nos. 80-11 and 80-15)) and that the Montana tax in invalid for the reasons expressed by Petitioners in *Commonwealth Edison Company, et al. v. State of Montana, et al.* (Nos. 80-581). In noting probable jurisdiction in the *Commonwealth Edison Company* case, the Court directed that the *Merrion* case be considered with it for oral argument.

The *Crow Tribe* case is not yet ripe for adjudication by this Court. The Tribe's complaint was dismissed by the District Court by the theory that the incidence of the tax was on Westmoreland and not on the Tribe and that nothing in the constitution prohibited the imposition of both a state and tribal tax on the same activity. 469 F. Supp. 154 (D. Mont. 1954). The propriety of that dismissal was argued before the Court of Appeals for the Ninth Circuit (No. 79-4321) in January 1980, but no decision has yet been issued.

The power of Tribes to tax non-Indians is not addressed in this Brief because the proper resolution of that issue may turn on the facts of each case. This Brief does address the question of the power of both Tribes and States to impose multiple taxes on the same mining activity since that is the heart of the mineral producers interest, and the resolution of that issue has broad implications for the Nation's energy policy.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously found that a combined State and Indian tax on the same mineral severance could not violate the Commerce Clause because the tax was not imposed by more than one State. This Court held in *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), that a state tax on the instrumentalities of foreign trade which had been taxed by Japan was invalid because it violated the foreign Commerce Clause. Since State and Tribal taxes on the same acts of mineral resorces may greatly impede the development of vast energy resources owned by Tribes, the principles adopted in the *Japan Lines* case should be applied in the case of interstate commerce arising from commerce with Indian tribes.

ARGUMENT

TRIBAL AND STATE TAXATION OF THE SAME MINING ACTIVITY VIOLATES THE COMMERCE CLAUSE.

The Court of Appeals in the *Merrion* case erroneously found that the imposition of both a State and Tribal tax on the same mineral severance "does not implicate the Federal interest in maintaining the flow of interstate commerce at all . . ." 617 F. 2d at 546. The only reason given by the court below for this astounding conclusion was that the prohibition against multiple taxation of interstate commerce applied only to multiple taxation by *states*. The Court concluded this rule could not apply because "It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation." 617 F. 2d at 546.

Multiple taxation of the same activity by different sovereigns necessarily interferes with the power granted Congress by Article I, §8 of the Constitution "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes," whether or not both sovereigns are States.

This Court's decision in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), established without question that the prohibition against multiple taxation of commerce is not limited to taxes imposed by two different states. In that case this Court found that the same principle applied to a conflict between a California tax on cargo containers and a previously imposed Japanese tax on the same containers and held that the state tax was invalid.

The reasons advanced by the Court for finding the state tax invalid demonstrates that a multiple tax by a state and another sovereign is likely to violate the Commerce Clause. The state of California had argued that the state tax was valid because the standards of *Complete Auto Transit, Inc. v. Brady* 430 U.S. 274 (1977) had been met. Those standards are that the state tax on interstate commerce is valid if the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

This contention was rejected by this Court for two reasons. The first was that "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. As a result, apportionment would not guarantee that multiple burdens could not occur. 441 U.S. at 447-448.

The second reason was that a state tax on the instrumentalities of commerce "may impair federal uniformity in an area where federal uniformity is essential." 441 U.S. at 448. Because the Court felt that the California tax prevented this Nation from "speaking with one voice" in regulating foreign trade, the Court held the California tax violated the federal interest in uniformity. 441 U.S. 451-453.

The Court summarized the tests which a tax must meet to avoid an unlawful multiple taxation to be:

> In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto,* a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the federal government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause. 441 U.S. at 451.

There is good reason for applying the Commerce Clause so as to prevent multiple taxation of commerce by both states and Indian tribes. A 25 percent Tribal tax on the combined value of the contract price of the coal and the 30 percent Montana Coal Severance tax can only be viewed as multiple taxation in the extreme. Because the combined effect of these taxes is most likely to make the coal unsalable on an economic basis, there clearly has been no attempt to apportion these taxes and the burden on both interstate commerce and commerce with the Indian Tribes is obvious.

This Court should recognize that the development of vast mineral resources owned by Indian tribes throughout the Western part of the United States will be greatly hindered if multiple taxes on the development of these resources is permitted. Should the Court determine that tribes do have the power to tax mineral severance by non-Indians, the conclusion of the Court below that a Commerce Clause question is not even presented by State and Indian taxes on the same act of severance should not be permitted to stand.

CONCLUSION

For the foregoing reasons, Westmoreland Resources, Inc. respectfully urges the Court to reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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